Supreme Court, U.S.
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NO.

IN THE

Supreme Court of the United States

LEGAL ENVIRONMENTAL ASSISTANCE FOUNDATION, INC.,
PETITIONER,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT,

and

STATE OIL AND GAS BOARD OF ALABAMA,
INTERVENOR.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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50 pgs

QUESTION PRESENTED

Whether the United States Court of Appeals erred in affirming the U.S. Environmental Protection Agency approval of Alabama's revised underground injection control program pursuant to 42 U.S.C. § 300h-4 where such program does not provide that coalbed methane well operators must satisfy the State that their proposed injection of hydraulic fracturing fluids will not result in the presence of any contaminant in underground sources of drinking water which may adversely affect the health of persons. *See* 42 U.S.C. §§ 300h(b)(1)(B)(i), 300h(d)(2).

CORPORATE DISCLOSURE STATEMENT

LEAF is a non-profit corporation. It has no parent corporation and no stock.

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ON PETITION FOR WRIT OF CERTIORARI
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PETITION FOR A WRIT OF CERTIORARI

The Legal Environmental Assistance Foundation, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-23a) is reported at 276 F.3d 1253 (11th Cir. 2001). The order denying rehearing and rehearing en banc (App.,

infra, 24a-25a) is reported at – F.3d – (Table, No. 00-10381-DD) (per curiam).

JURISDICTION

The judgment of the court of appeals was entered on December 21, 2001. A petition for rehearing was denied on March 18, 2002. App., *infra*, 24a-25a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Safe Drinking Water Act (42 U.S.C. §§ 300h and 300h-4) are reprinted in an appendix to this petition. App., *infra*, 26a-32a.

STATEMENT OF THE CASE

Hydraulic fracturing is a technique used by the oil and gas industry for enhancing the recovery of natural gas from underground formations. In Alabama, it is commonly used in connection with the extraction of natural methane gas from coal beds. Coal beds, as all underground formations, are formed of porous, sometimes fractured, materials. These coal beds contain natural gas, which can be extracted through production wells. Because of the tightness of coal bed formations and their very low permeability, the rate of production of natural gas is low in the absence of production enhancement.

Experience has shown that coal beds must be hydraulically fractured to induce or stimulate a significant flow of gas. "Hydraulic fracturing" involves the injection of fluids and a propping agent (usually sand) into a coal bed. The application of pressure injects

> fluids into the coal bed thereby widening natural fractures and inducing new ones that are held open by the propping agent after the pressure is released. As a result, these fractures provide paths for gas to migrate to the wellbore, thus stimulating gas flow. It has been demonstrated that the gas flow rate from a coal bed may be increased as much as twenty-fold by hydraulic fracturing.

Legal Envtl. Assistance Found., Inc. v. United States Envtl. Protection Agency, 118 F.3d 1467, 1470 (11th Cir. 1997) [hereinafter, "*LEAF I*"] (citations omitted).

> Several thousand coal bed methane gas production wells have been constructed in Alabama since 1980. Due to the large number of these wells, EPA has recognized that "there is a growing potential for contamination of drinking water aquifers," resulting primarily from the hydraulic fracturing necessary to stimulate production.

Id. at 1471.[1]

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[1] A 1998 survey found that there are 10,373 coalbed methane wells in 13 states. Survey Results on Inventory and Extent of Hydraulic Fracturing in Coalbed Methane Wells in the Producing States, Ground Water Protection Council (Dec. 15, 1998) attached to State Oil and Gas Board of Alabama Comments (Nov. 22, 1999). Since this survey, the number of coalbed methane wells projected to become operational during the next ten years has increased tremendously. *See e.g.*, Bureau of Land Management, Notice of Availability of Draft Environmental Impact Statement, 67 Fed. Reg. 6943 (2002) (10,000 wells in the Montana portion of the Powder River Basin); Bureau of Land Management, Notice of Availability of Draft Environmental Impact Statement, 67 Fed. Reg. 1497, 1498 (2002) (51,000 wells in the

"In Alabama, hydraulic fracturing of coal beds generally occurs by injecting fluids directly into underground sources of drinking water." 65 Fed. Reg. 2889, 2891 (2000) (final approval of Alabama's Class II UIC program revision). The chemical constituents of hydraulic fracturing fluids include as many as 40 chemicals (*e.g.*, propargyl alcohol, formaldehyde, ethylene glycol, fumaric acid, acetic acid, acetone, sulfuric acid, and sodium hydroxide), only four of which are subject to national primary drinking water regulations (40 C.F.R. Part 141). *E.g.*, Selected Hydraulic Fracturing Fluid Constituents, Drinking Water Standards, and Available Health Effects Data, LEAF Comments (Nov. 26, 1999) Exhibit BBB; Halliburton Services, Comparison of Three Halliburton Coalbed Methane Stimulation Treatments to U.S. EPA National Primary and Secondary Drinking Water Regulations (1999), LEAF Comments (Nov. 26, 1999) Exhibit Y. *See LEAF I*, 118 F.3d at 1471 ("The fluids used in hydraulic fracturing may contain guar gel, nitrogen or carbon dioxide gases, gelled oil, diesel oil, sodium hydroxide, hydrochloric acid, sulfuric acid, fumeric acid, as well as other additives.).

Part C of the Safe Drinking Water Act (SDWA) establishes a regulatory program for the protection of underground sources of drinking water. *See* 42 U.S.C. §§ 300h to 300h-8. This program requires EPA to promulgate regulations that set forth minimum requirements for state Underground Injection Control (UIC) programs. 42 U.S.C. § 300h.[2] A state must submit

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Wyoming portion of the Powder River Basin).

[2] The minimum requirements are identified in 40 C.F.R. Part 145, Subparts B and C.

to EPA a proposed UIC program that meets these minimum requirements, and receive EPA approval thereof, in order to obtain primary regulatory and enforcement responsibility for underground injection activities within that state. 42 U.S.C. § 300h-1. Alternatively, if a state UIC program relates to certain specified oil or natural gas activities, the state may submit a program that meets the requirements of 42 U.S.C. § 300h(b)(1)(A)-(D) and "represents an effective program . . . to prevent underground injection which endangers underground drinking water sources." 42 U.S.C. § 300h-4(a).[3] The state retains primary responsibility until EPA determines, by rule, that the state UIC program no longer meets the minimum requirements established under 42 U.S.C. § 300h. 42 U.S.C. § 300h-1(b)(3).[4] *See LEAF I*, 118 F.3d at 1469-70. *See also Legal Envtl. Assistance Found., Inc. v. Board of County Comm'rs of Brevard County, Florida*, 10 F.3d 1579, 1580 (11th Cir. 1994) (per curiam). If EPA promulgates a rule disapproving a state UIC program, EPA must promulgate a federal UIC program for the state within 90 days. 42 U.S.C. § 300h-1(c).

To prevent endangerment to underground sources of drinking water, state UIC programs are normally required to prohibit the injection of fluids through Class II wells directly into underground sources of drinking

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[3] EPA has published Guidance for State Submissions under 42 U.S.C. § 300h-4(a), appearing at LEAF Comments (Nov. 26, 1999) Exhibit Q, *reprinted in* 46 Fed. Reg. 27333 (1981), to assist states in preparing UIC program submissions under 42 U.S.C. § 300h-4(a).

[4] *See also* 40 C.F.R. § 145.34(b).

water. 40 C.F.R. § 146.22(a).[5] However, a state UIC program developed and submitted to EPA under 42 U.S.C. § 300h-4 is authorized to be somewhat more flexible,[6] but must nevertheless meet the requirements of subparagraphs (A) through (D) of 42 U.S.C. § 300h(b)(1).

Alabama's UIC program for Class II wells[7] was initially approved by EPA in 1982. 47 Fed. Reg. 33268 (1982); 40 C.F.R. §147.50. In 1994, LEAF petitioned EPA to initiate proceedings to withdraw approval of the program because it failed to regulate the underground injection of hydraulic fracturing fluids to enhance the recovery of methane gas from coal beds. EPA denied

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[5] 40 C.F.R. § 146.22(a) provides that "[a]ll new Class II wells shall be sited in such a fashion that they inject into a formation which is separated from any underground source of drinking water by a confining zone that is free of known open faults or fractures within the area of review."

[6] The Court of Appeals said:

> The SDWA provides two statutory methods for approval of a state's UIC program. See SDWA § 1422(b) (codified at 42 U.S.C. § 300h-1(b)); SDWA § 1425 (codified at 42 U.S.C. § 300h-4(a)). Approval under § 1422(b) requires a state to show that its UIC program satisfies applicable federal regulations promulgated by EPA under 42 U.S.C. § 300h and set forth in 40 C.F.R. Part 145. Approval under § 1425 requires a state to demonstrate that its UIC program meets the requirements of SDWA §§ 1421(b)(1)(A)-(D), and represents an effective program to prevent underground injection which endangers drinking water sources.

Legal Envtl. Assistance Found., Inc. v. United States Envtl. Protection Agency, 276 F.3d 1253, 1256-57 (11th Cir. 2001) [hereinafter, *"LEAF III"*].

[7] A Class II well includes any well which injects fluids for the enhanced recovery of natural gas. 40 C.F.R. § 144.6(b).

LEAF's petition and LEAF sought review in the Court of Appeals. The Court granted LEAF's petition, held that the injection of hydraulic fracturing fluids to enhance the recovery of methane gas from coal beds is "underground injection" and is required to be regulated by the SDWA, and remanded the matter to EPA for further proceedings. *LEAF I.*

Subsequently, LEAF sought and the Court of Appeals issued a writ of mandamus to enforce the Court's mandate. *In re Legal Envtl. Assistance Found., Inc.*, No. 98-06929 (11th Cir. Feb. 18, 1999) (unpublished) [hereinafter, "*LEAF II*"]. EPA then initiated proceedings to withdraw approval of Alabama's Class II UIC program. *See* 64 Fed. Reg. 27744 (1999) (proposed rule). Thereafter, Alabama submitted a revised UIC program to EPA. *See* 64 Fed. Reg. 56987 (1999).

The revised UIC program for Class II wells which Alabama submitted to EPA for approval under 42 U.S.C. § 300h-4 provides that coalbed methane Class II well operators shall certify either that their proposed fracturing operations will not occur in an underground source of drinking water or that the mixture of fluids to be used to hydraulically fracture the coal beds does not exceed the primary drinking water regulations. Ala. Admin. Code R. 400-4-5-.04(3) [now R. 400-3-8-.03(3)]. The revised Alabama UIC program does *not* require that operators who propose to inject hydraulic fracturing fluids directly into underground sources of drinking water satisfy the State that the underground injection will not endanger drinking water sources, *i.e.*, demonstrate that the injected fluids will not "otherwise adversely affect the health of persons."

EPA proposed to approve Alabama's revised UIC program, 64 Fed. Reg. 56986 (1999), and conducted a public hearing and received written comments thereon. Despite that the 40 chemical constituents of hydraulic fracturing fluids will be injected directly into underground sources of drinking water, that most of these chemicals are not subject to national primary drinking water regulations, and that well operators are not required to satisfy the State that the fluids will not "otherwise adversely affect the health of persons," on January 19, 2000, EPA approved Alabama's revised UIC program. 65 Fed. Reg. 2889 (2000).

On January 25, 2000, LEAF filed a petition for review of EPA's decision to approve Alabama's revised UIC program in the United States Court of Appeals for the Eleventh Circuit on the grounds that the decision was not in accordance with the law (*i.e.*, the SDWA and EPA regulations) and was arbitrary and capricious. The Court of Appeals had jurisdiction to review EPA's rule pursuant to 42 U.S.C. § 300j-7(a)(2). *See LEAF I*, 118 F.3d at 1472. A panel of the Court issued a decision and opinion on December 21, 2001. The panel held (1) that EPA's decision to subject Alabama's UIC program for hydraulic fracturing to 42 U.S.C. § 300h-4(a) approval is based on a permissible construction of the statute; (2) that EPA's decision to classify hydraulic fracturing of coal beds to produce methane as a "Class II-like underground injection activity" rather than a Class II well is inconsistent with the plain language of 40 C.F.R. § 144.6; and (3) that EPA's determination that Alabama's UIC program meets the requirements of 42 U.S.C. § 300h(b)(1)(A)-(D) and "represents an effective program (including adequate recordkeeping and reporting) to prevent underground injection which endangers drinking water sources," 42 U.S.C. § 300h-4(a), is not

arbitrary or capricious. *LEAF III*. LEAF timely filed a petition for rehearing and rehearing en banc on the third holding of the panel decision. The petition was denied on March 18, 2002.

REASONS FOR GRANTING THE PETITION

The United States Court of Appeals erred in affirming the U.S. Environmental Protection Agency approval of Alabama's revised underground injection control program pursuant to 42 U.S.C. § 300h-4 where such program does not provide that coalbed methane well operators must satisfy the State that their proposed injection of hydraulic fracturing fluids will not result in the presence of any contaminant in underground sources of drinking water which may adversely affect the health of persons. *See* 42 U.S.C. §§ 300h(b)(1)(B)(i), 300h(d)(2).

Agency action is arbitrary under 5 U.S.C. § 706(2)(a) if it fails to consider the relevant factors or an important aspect of the problem. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). In the instant case, EPA failed to require that coalbed methane well operators who propose to inject hydraulic fracturing fluids directly into underground sources of drinking water satisfy the State that their proposed injection will not result in the presence of any contaminant in underground water which may adversely affect the health of persons. This failure directly contravenes the mandate of 42 U.S.C. §§ 300h(b)(1)(B)(i) and 300h(d)(2).

42 U.S.C. § 300h(b)(1) provides:

> Regulations under subsection (a) of this section for State underground injection programs shall contain minimum requirements for effective programs to prevent underground injection which endangers drinking water sources within the meaning of subsection (d)(2) of this section. Such regulations shall require that a State program, in order to be approved under section 300h-1 of this title -
>
> . . .
>
> (B) shall require (i) in the case of a program which provides for authorization of underground injection by permit, that *the applicant for the permit to inject must satisfy the State that the underground injection will not endanger drinking water sources*, ...

(Emphasis added). This subsection was discussed in the Report of the House Interstate and Foreign Commerce Committee:

> The Administrator's guidelines for State underground injection control programs must, as a minimum, require States to . . . require applicants for underground injection permits to bear the burden of proving to the State that its injection will not endanger drinking water sources; . . ..

H.R. Rep. No. 93-1185, 93rd Cong., 2nd Sess. 28 (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 6454, 6481.

42 U.S.C. § 300h(d)(2) provides:

> Underground injection endangers drinking water sources if such injection may result in the presence in underground water which supplies or can reasonably be expected to supply any public water system of any contaminant, and if the presence of such contaminant may result in such system's not complying with any national primary drinking water regulation or *may otherwise adversely affect the health of persons.*

(Emphasis added). This subsection was also discussed in the Report of the House Interstate and Foreign Commerce Committee:

> [T]he protection is to apply to any injected substance (or derivative thereof) whether or not that substance is a contaminant subject to national primary drinking water regulations. Thus the injections [sic] is to be subject to regulation or prohibition if the injected substance may cause or contribute to noncompliance with a National primary drinking water regulation or if it may otherwise adversely affect the public health, including causing or contributing to the water's unfitness for human consumption.

H.R. Rep. No. 93-1185, 93rd Cong., 2nd Sess. 28-29 (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 6454, 6481.[8]

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[8] The statutory definition of "endangerment" is not limited to contamination which exceeds the Maximum Contaminant Levels for drinking water in 40 C.F.R. Part 141. The House Committee on Interstate and Foreign Commerce discussed the need to consider more than Maximum Contaminant Levels during consideration of the

42 U.S.C. § 300h(b)(1)(B)(i) applies to UIC programs developed pursuant to the alternative demonstration provisions of 42 U.S.C. § 300h-4(a). Thus, even a state UIC program developed under 42 U.S.C. § 300h-4 must require that an applicant for a permit to inject satisfy the State that the proposed injection will not endanger drinking water sources as described in 42 U.S.C. § 300h(d)(2), *i.e.*, that the injection will not result in the presence of any contaminant in underground water which supplies or can reasonably be expected to supply any public water system, if the presence of such contaminant may result in such system's not complying with any national primary drinking water regulation or *may otherwise adversely affect the health of persons.*

Despite that the 40 chemical constituents of hydraulic fracturing fluids will be injected directly into underground sources of drinking water, that most of these chemicals are not subject to national primary drinking water regulations, and that well operators are

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bill which became law:

> The Committee was concerned that its definition of 'endangering drinking water sources' also be construed liberally. Injection which causes or increases contamination of such sources may fall within this definition even if the amount of contaminant which may enter the water source would not by itself cause the maximum allowable levels to be exceeded. The definition would be met if injected material were not completely contained within the well, if it may enter either a present or potential drinking water source, and if it (or some form into which it might be converted) may pose a threat to human health or render the water source unfit for human consumption.

H. Rep. No. 93-1185, 93rd Cong., 2d Sess. 32, *reprinted in* 1974 U.S. Code Cong. & Admin. News 6454, 6484.

not required to satisfy the State that these chemicals will not "otherwise adversely affect the health of persons," EPA approved Alabama's revised UIC program. 65 Fed. Reg. 2889 (2000).

EPA explained its consideration of 42 U.S.C. § 300h(b)(1)(B)(i) as follows:

> Section 1421(b)(1)(B)(i) [42 U.S.C. § 300h(b)(1)(B)(i)] is satisfied because, while the Alabama regulation does not establish a permit requirement, Rule 400-4-5-.04(4) [now R. 400-3-8-.03(5)] states: "Coal beds shall not be hydraulically fractured until the written approval of the Supervisor is obtained."

65 Fed. Reg. at 2894.[9] However, nothing in Ala. Admin. Code R. 400-4-5-.04(4) [now R. 400-3-8-.03(5)], indeed, nothing in R. 400-3-8-.03, requires that well operators bear the burden of proving to the satisfaction of the State that the proposed injection of hydraulic fracturing fluids will not "otherwise adversely affect the health of persons" prior to being granted approval to inject.

EPA identified the well operator's demonstration burden as follows:

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[9] *See also* Summary of Public Comments and Environmental Protection Agency Responses to the Proposed Withdrawal of Alabama's Class II UIC Program and Subsequent Approval of Alabama's Revised UIC Program (Dec. 21, 1999) at 42 ("Alabama's hydraulic fracturing program is structured to assure that USDWs are not endangered where the injectate enters the aquifer directly because such injectate may not exceed MCLs.").

> The State has also adopted additional regulatory provisions preventing underground injection which endangers drinking water sources. State Rule 400-4-5-.04(3) [now R. 400-3-8-.03(3)] states: "The operator shall certify in writing to the Supervisor that the proposed fracturing operation will not occur in a USDW. Evidence that supports how the determination was made shall accompany such certification and be acceptable to the Supervisor. Otherwise, the operator shall certify in writing to the Supervisor that the mixture of fluids to be used to hydraulically fracture the coal beds does not exceed the maximum contaminant levels contained in 40 CFR § 141 Subparts B and G." This provision requires a certification that fracturing fluids will not be injected into a USDW or establishes specifications for the quality of the injectate should the injection occur into the USDW. Specifically, it states that the injectate must meet drinking water standards. Therefore, EPA concludes that adequate provisions have been established to prevent endangerment of drinking water sources from hydraulic fracturing operations.

65 Fed. Reg. at 2894-95.

Here, EPA's failure to consider a relevant factor is demonstrated beyond question. Well operators who inject directly into an underground source of drinking water are only required to satisfy the state that the fluids proposed to be injected will not exceed national primary drinking water regulations. Most of the 40 chemical constituents in hydraulic fracturing fluids will not exceed those regulations because the chemicals are not

addressed by the regulations.[10] Well operators are not required to satisfy the state that the fluids proposed to be injected will not "otherwise adversely affect the health of persons."

EPA recently proposed a UIC rule for Florida which recognized the merit of the issue LEAF raises here. There, EPA was faced with the same concern - that constituents of the fluids to be injected may not be subject to the national primary drinking water regulations but nevertheless may otherwise adversely affect the health of persons. EPA proposed to require that

> [Applicants] shall also provide a non-endangerment demonstration that the injected fluids will not cause any USDWs to exceed primary drinking water regulations in Part 141 of this chapter *and other health based standards (e.g., Federal and State health advisories).*

65 Fed. Reg. 42233, 42244 (2000) (proposed rule) (emphasis added). While "other health based standards (e.g., Federal and State health advisories)" may not encompass the universe of problematic constituents of injected fluids in every case, it is nevertheless a recognition by EPA that a demonstration of compliance with primary drinking water regulations alone is not a

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[10] Because most of 40 chemical constituents of hydraulic fracturing fluids are not subject to national primary drinking water regulations, the certification required by Ala. Admin. Code R. 400-4-5-.04(3) [now R. 400-3-8-.03(3)] is virtually meaningless. A well operator can truthfully certify that the injection fluid does not exceed drinking water standards when the fluid contains ethylene glycol, fumaric acid, acetic acid, acetone, sulfuric acid, and sodium hydroxide.

sufficient demonstration to meet the requirements of 42 U.S.C. §§ 300h(b)(1)(B)(i) and 300h(d)(2).

A well operator's certification that fluids proposed to be injected directly into an underground source of drinking water will not exceed national primary drinking water regulations addresses only half of the non-endangerment demonstration required by the SDWA. *See* 42 U.S.C. §§ 300h(b)(1)(B)(i), 300h(d)(2). The other half - not addressed by the Alabama UIC program approved by EPA - is a demonstration by the applicant that the fluids proposed to be injected will not otherwise adversely affect the health of persons. EPA's approval of Alabama's revised UIC program was arbitrary and capricious because EPA failed to require that coalbed methane well operators satisfy the State that their proposed injection of hydraulic fracturing fluids will not result in the presence of any contaminant in underground sources of drinking water which *may adversely affect the health of persons.*

CONCLUSION

The Court of Civil Appeals erred in affirming EPA's approval of Alabama's revised Class II UIC program. EPA's approval is arbitrary because EPA failed to require that coalbed methane well operators satisfy the State that their proposed injection of hydraulic fracturing fluids will not result in the presence of any contaminant in underground sources of drinking water which *may adversely affect the health of persons* as required by 42

U.S.C. § 300h(b)(1)(B)(i). Accordingly, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
DECEMBER 21, 2001
THOMAS K. KAHN
CLERK

No. 00-10381

EPA No. 65-02889-FED.REG.

LEGAL ENVIRONMENTAL ASSISTANCE FOUNDATION, INC.,

Petitioner,

versus

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

Petition for Review of a Final Order of the Environmental Protection Agency

(December 21, 2001)

Before BLACK and MARCUS, Circuit Judges, and HANCOCK*, District Judge.

* Honorable James H. Hancock, U.S. District Judge for the Northern District of Alabama, sitting by designation.

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BLACK, Circuit Judge:

Petitioner, the Legal Environmental Assistance Foundation (LEAF), seeks review of the United States Environmental Protection Agency's (EPA's) approval of Alabama's revised underground injection control (UIC) program for the underground injection of hydraulic fracturing fluids to enhance the recovery of methane gas from coal beds. For the reasons discussed below, we deny in part and grant in part the petition and remand for further proceedings.

I. BACKGROUND

A. Regulation of Underground Injection under the Safe Drinking Water Act

Part C of the Safe Drinking Water Act (SDWA) is designed to protect underground drinking water sources from contamination caused by underground injection of fluids. *See* 42 U.S.C. §§ 300h to 300h-8. This program requires EPA to promulgate regulations that set forth minimum requirements for state UIC programs. *See id.* § 300h. A state must submit to EPA a proposed UIC program that satisfies these minimum requirements, and must meet EPA approval in order to obtain primary regulatory and enforcement responsibility for underground injection activities within that state. *See id.* § 300h-1. The state retains primary responsibility until EPA determines, by rule, that the state UIC program no longer meets the minimum requirements established under the SDWA. *See id.* § 300h-1(b)(3).

B. Procedural History of Alabama's UIC Program

Alabama's UIC program for Class II wells[1] was initially approved by EPA in 1982.[2] *See* 47 Fed. Reg. 33268 (1982); 40 C.F.R. § 147.50. The UIC program approved in 1982 did not regulate hydraulic fracturing associated with methane production.[3] In 1994, LEAF

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[1] EPA's regulations implementing Part C of the SDWA require that states classify injection wells into one of five categories. Class II wells are defined as:

> Wells which inject fluids: (1) Which are brought to the surface in connection with natural gas storage operations, or conventional oil or natural gas production and may be commingled with waste waters from gas plants which are an integral part of production operations, unless those waters are classified as a hazardous waste at the time of injection; (2) For enhanced recovery of oil or natural gas; and (3) For storage of hydrocarbons which are liquid at standard temperature and pressure.

40 C.F.R. § 144.6(b).

[2] The Alabama UIC program was approved by EPA in two parts. On August 2, 1982, EPA approved Alabama's UIC program for Class II wells, to be administered by the State Oil and Gas Board of Alabama. *See* 40 C.F.R. § 147.50. On August 23, 1983, EPA approved Alabama's UIC program for Class I, III, IV, and V wells to be administered by the Alabama Department of Environmental Management. *See id.* § 147.51. The effective date of this program was August 25, 1983.

[3] Hydraulic fracturing is a technique to enhance the recovery of methane gas from coal beds. *See Legal Envtl. Assist. Found., Inc. v. United States Envt'l Protection Agency*, 118 F.3d 1467, 1470 (11th Cir. 1997) (*LEAF I*). In Alabama, hydraulic fracturing is commonly used in connection with the extraction of natural gas from coal beds. *See id.* EPA defines hydraulic fracturing as a "temporary and intermittent process in which fluids are injected underground at high pressures to create fractures in the coals seam that enhance the

petitioned EPA to withdraw approval of the Alabama UIC program. *See Legal Envt'l Assist. Found., Inc. v. United States Envt'l Protection Agency*, 118 F.3d 1467, 1471 (11th Cir. 1997) (*LEAF I*). LEAF alleged that the Alabama program was deficient because it did not regulate hydraulic fracturing activities associated with methane gas production as required under Part C of the SDWA. *See id.* EPA denied LEAF's petition because it determined that hydraulic fracturing did not fall within the regulatory definition of "underground injection." *See id.* EPA decided that methane gas production wells, which are also used for hydraulic fracturing, need not be regulated under UIC programs because the principal function of these wells is methane gas production and not the underground emplacement of fluids. *See id.* LEAF subsequently petitioned this Court for review, contending that EPA's interpretation of the regulations rendered the regulations inconsistent with the statute. *See id.* at 1472. We concluded that hydraulic fracturing activities constitute underground injection under Part C of the SDWA. *See id.* at 1478. Since EPA's contrary interpretation could not be squared with the plain language of the statute, we granted LEAF's petition for review and remanded for further proceedings. *See id.*

Thereafter, LEAF sought, and this Court issued, a writ of mandamus to enforce the Court's mandate in *LEAF I*. *See In re Legal Envtl. Assist. Found., Inc.*, No. 98-06929 (11th Cir. Feb. 18, 1999) (unpublished). EPA subsequently initiated proceedings to withdraw approval of Alabama's Class II UIC program. *See* 64 Fed. Reg. 27744 (1999) (proposed rule). Before the withdrawal

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recovery of methane gas by creating pathways for the gas to flow to the surface." 65 Fed. Reg. 2889, 2892 (2000).

proceedings were completed, however, Alabama submitted a revised UIC program to the EPA, *see* 64 Fed. Reg. 56986 (1999) (proposed rule), seeking approval of its revised UIC program under the alternative demonstration provision in § 1425 of the SDWA, 42 U.S.C. § 300h-4(a). EPA proposed to approve Alabama's revised UIC program, *see* 64 Fed. Reg. 56986 (1999), and conducted a public hearing and received written comments thereon. LEAF objected, arguing that approval under § 300h-4(a) was improper because hydraulic fracturing did not fall within the scope of activities identified in § 1425, and approval under that section was therefore improper. *See* LEAF Comments (Nov. 26, 1999) at 3-8. EPA rejected LEAF's argument, and, on January 19, 2000, promulgated a final rule approving Alabama's revised UIC program under § 1425. *See* 65 Fed. Reg. 2889 (2000). Thereafter, LEAF timely filed this petition for review.

In this appeal, LEAF argues that EPA's approval of Alabama's UIC program should be set aside for three reasons. First, LEAF argues that the underground injection of hydraulic fracturing fluids to enhance the recovery of methane gas from coal beds is not "underground injection for the secondary or tertiary recovery of . . . natural gas" under § 1425 and, therefore, EPA's approval of Alabama's revised UIC program under that section is not "in accordance with the law." Second, LEAF contends that wells used for the injection of hydraulic fracturing fluids to enhance the recovery of methane gas from coal beds are "Class II wells" as defined in 40 C.F.R. § 144.6(b). According to LEAF, it follows that EPA's approval of Alabama's revised UIC program, which regulates such hydraulic fracturing as a "Class II-like underground injection activity" is "not in accordance with law." Third, LEAF argues that even if

Alabama's revised UIC program is covered by the alternative approval procedure pursuant to § 1425, EPA's approval of the revised program is arbitrary and capricious. We address each argument in turn.

II. DISCUSSION

A. EPA's Approval of Alabama's UIC Program under Section 1425

1. Statutory Framework

The SDWA provides two statutory methods for approval of a state's UIC program. *See* SDWA § 1422(b) (codified at 42 U.S.C. § 300h-1(b)); SDWA § 1425 (codified at 42 U.S.C. § 300h-4(a)). Approval under § 1422(b) requires a state to show that its UIC program satisfies applicable federal regulations promulgated by EPA under 42 U.S.C. § 300h and set forth in 40 C.F.R. Part 145. Approval under § 1425 requires a state to demonstrate that its UIC program meets the requirements of SDWA §§ 1421(b)(1)(A)-(D), and represents an effective program to prevent underground injection which endangers drinking water sources. Significantly, the practical difference between the two statutory methods for approval is that the requirements for those programs covered under § 1425 are more flexible than the requirements for those programs covered under § 1422(b). Section 1425, however, only applies to specific types of UIC programs.

Section 1425 provides:

> For purposes of the Administrator's approval or disapproval under section 300h-1 of this title of

> that portion of any State underground injection control program which relates to—
>
> > (1) the underground injection of brine or other fluids which are brought to the surface in connection with oil or natural gas production or natural gas storage operations, or
> >
> > (2) any underground injection for the secondary or tertiary recovery of oil or natural gas,
>
> in lieu of the showing required under subparagraph (A) of section 300h-1(b)(1) of this title the State may demonstrate that such portion of the State program meets the requirements of subparagraphs (A) through (D) of section 300h(b)(1) of this title and represents an effective program (including adequate recordkeeping and reporting) to prevent underground injection which endangers drinking water sources.

SDWA § 1425 (codified at 42 U.S.C. § 300h-4(a)).

In approving Alabama's revised UIC program regulating the hydraulic fracturing of coal beds under this section, EPA recognized that the language of § 1425 does not specifically mention hydraulic fracturing. *See* 65 Fed. Reg. at 2892. EPA perceived the absence of hydraulic fracturing from § 1425 as a gap in the statutory scheme. *See id.* Seeking to fill this perceived gap in the statute, EPA construed § 1425 as applying not only to specific processes used during secondary or tertiary recovery of natural gas, but also generally to techniques and processes – such as hydraulic fracturing – broadly

related to secondary or tertiary recovery. *See id.* On this basis, EPA concluded that the process of hydraulic fracturing, while not technically identical to secondary or tertiary recovery of natural gas, is an "analogous" process, and therefore covered by the alternate approval method set forth in § 1425. *See id.* at 2892-93.

2. Standard of Review

LEAF challenges EPA's construction of § 1425 as contrary to the statute's plain meaning and therefore not in accordance with the law. The standard against which we evaluate LEAF's argument is set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45, 104 S. Ct. 2778, 2781-83 (1984). The *Chevron* test has two steps. "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43, 104 S. Ct. at 2781. "If, however, the court determines Congress has not directly addressed precise question at issue," the court proceeds to step two. *Id.* at 843, 104 S. Ct. at 2781-82. There, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*, 104 S. Ct. at 2782. If the agency's interpretation is reasonable, a reviewing court may not substitute its own construction of the statutory provision for that of the agency. *See id.* at 844, 104 S. Ct. at 2782. An agency's reasonable statutory interpretation must therefore stand even in the face of other permissible interpretations, including that which the court may have chosen had the question initially arisen in a judicial proceeding. *See id.* at 843 n.11, 104 S. Ct. at 2782 n.11. Deference is not owed to an agency interpretation, however, if it construes a

statute in a way that is contrary to clear congressional intent. *See id.* at 843 n.9, 104 S. Ct. 2781 n.9.

3. *Chevron* Analysis

a. *Chevron* Step One

In this case, the question at issue is whether a state's program for underground injection of hydraulic fracturing fluids to enhance the recovery of methane gas from coal beds may be approved under the alternative demonstration provisions of § 1425. In determining whether Congress has spoken directly to this issue, we "look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S. Ct. 1811, 1818 (1988). Our inquiry begins, as always, with the text of the statute. *See FMC Corp. v. Holliday*, 498 U.S. 52, 57, 111 S. Ct. 403, 407 (1990) ("We begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.") (quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194, 105 S. Ct. 658, 661 (1985)) (internal quotation marks omitted). Additionally, it is an elementary principle of statutory construction that, in construing a statute, we must give meaning to all the words in the statute. *See Bailey v. United States*, 516 U.S. 137, 146, 116 S. Ct. 501, 507 (1995) (noting that each word in a statute is intended to have "particular, nonsuperfluous meaning").

The key words in § 1425 to which we must give meaning are "relates to." These two words are central to this case because § 1425 applies not simply to "any underground injection for the secondary or tertiary recovery of oil or natural gas," but rather to "that portion

of any State underground injection control program which *relates to* . . . any underground injection for the secondary or tertiary recovery of oil or natural gas . . . ." 42 U.S.C. § 300h-4(a) (emphasis added). The parties set forth different interpretations of § 1425. While the difference between the two constructions is subtle, the effect is significant. Not surprisingly, the difference between the two interpretations of § 1425 turns largely on the meaning given to the phrase "relates to." EPA argues that the phrase "relates to" evinces Congress' intention to permit a portion of a state's UIC program to fall under § 1425, provided that the activity controlled by that portion relates to "the underground injection of brine or other fluids which are brought to the surface in connection with oil or natural gas production or natural gas storage operations," or "any underground injection for the secondary or tertiary recovery of oil or natural gas." 65 Fed. Reg. at 2892 (quoting 42 U.S.C. § 300h-4(a)) (characterizing § 1425 as "an alternative demonstration for 'secondary or tertiary recovery'-related injection"). EPA concludes that the process of hydraulic fracturing, while not technically identical to secondary or tertiary recovery of natural gas, is analogous to, and therefore "relates to," secondary and tertiary recovery of gas. Accordingly, EPA asserts that hydraulic fracturing is covered by the alternate approval method set forth in SDWA § 1425.

LEAF, on the other hand, argues that the phrase "relates to" evinces Congress' intent to permit a portion of a state's UIC program to fall under § 1425 only if there is a direct relationship between "that portion" of a State's program and one of two specific activities: "the underground injection of brine or other fluids which are brought to the surface in connection with oil or natural gas production or natural gas storage operations," and

"underground injection for the secondary or tertiary recovery of oil or natural gas." *Id.* LEAF asserts that where Congress has been so specific in identifying the activities for which an alternate UIC program can be approved, it is inappropriate for EPA to assume that any other activities are included. Therefore, LEAF asserts that because the injection of hydraulic fracturing fluids to enhance the recovery of methane gas from coal beds is not one of the two specifically identified activities, it cannot qualify for approval under § 1425.[4] *Cf., United States v. Anderson*, 200 F.3d 1344, 1348 (11th Cir. 2000) (sentencing guideline provision which expressly applies to specified offenses should be construed to exclude application to other offenses).

Of the two interpretations of § 1425 offered by the parties, we find EPA's interpretation more compelling. By focusing only on whether hydraulic fracturing is the same as "secondary or tertiary recovery of oil or natural gas," LEAF's construction of § 1425 fails to give full weight to the phrase "relates to." Since "relates to" injects ambiguity and interpretative breadth into this statutory provision, we cannot accept LEAF's construction. We conclude, therefore, as a threshold matter that the statutory provision at issue, read in its entirety, *i.e.*, "that portion of any State underground injection control program which relates to . . . any underground injection for the secondary or tertiary recovery of oil or natural gas," does not "directly" and

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[4] Neither party argues that hydraulic fracturing is "the underground injection of brine or other fluids which are brought to the surface in connection with oil or natural gas production or natural gas storage operations . . . ." 42 U.S.C. § 300h-4. Additionally, neither party argues that hydraulic fracturing is identical to secondary and tertiary recovery. We therefore do not assume either of these propositions are true for purposes of this appeal.

"unambiguously" speak to whether a state's program regulating hydraulic fracturing may be approved under § 1425.

b. *Chevron* Step Two

According requisite deference to the EPA's interpretation of § 1425, we review EPA's conclusion that the process of hydraulic fracturing, while not technically identical to secondary or tertiary recovery of natural gas, is "analogous" to secondary and tertiary recovery and therefore covered by the alternate approval method set forth in SDWA § 1425. Under the second step of the *Chevron* analysis, the question we must answer "is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843, 104 S. Ct. at 2782. We have little trouble concluding that EPA's decision to subject hydraulic fracturing to approval under § 1425 rests upon a permissible construction of the statute.

EPA bases its interpretation of § 1425 primarily on two grounds.[5] First, EPA asserts that hydraulic fracturing is a gas production enhancement process that is technically analogous to secondary and tertiary recovery techniques, and therefore covered by the alternate approval method set forth in § 1425.[6] EPA

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[5] In addition to the reasons discussed below, EPA relies on legislative history in construing § 1425 broadly. Since we conclude that the two reasons discussed below provide sufficient support for EPA's interpretation of § 1425, we need not examine the legislative history cited by EPA.

[6] The phrase "secondary or tertiary recovery of oil or natural gas" is not defined in the SDWA. The phrase is a technical phrase well-understood in the oil and gas industry. Where Congress has used

determined that both procedures generally enhance oil or gas production through the underground injection of fluids (gas or liquid) through an injection well to increase reservoir pressure and to drive oil or gas to a production well. *See* 65 Fed. Reg. at 2892. EPA further notes that one of LEAF's own exhibits confirms that hydraulic fracturing has traditionally been used to "aid in secondary recovery operations." *See* Information on Well-Stimulation Processes, U.S. Envt'l Protection Agency (1998 Draft), appearing at LEAF Comments, Exh.

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technical words or terms of art, it is appropriate to explain them by reference to the art or science to which they apply. *See, e.g., Corning Glass Works v. Brennan*, 417 U.S. 188, 201, 94 S. Ct. 2223, 2231 (1974); *United States v. Rodriguez*, 980 F.2d 1375, 1378 (11th Cir. 1992). Within the oil and gas industry, secondary recovery is understood as a technique that augments or replaces depleted natural reservoir pressure that would otherwise drive the oil or gas from the reservoir to the wellbore of the production well.

> The process has been described as follows:
>
> When oil production declines because of hydrocarbon production from the formation, the secondary oil recovery process is employed to increase the pressure required to drive the oil to the production wells. The mechanism of secondary oil recovery is similar to that of the primary oil recovery except that more than one wellbore is involved, and the pressure of the petroleum reservoir is augmented or maintained artificially to force oil to the production wells.

Enhanced Oil Recovery, II (Erle C. Donaldson, et al. eds., 1989) 3, appearing at LEAF Comments (Nov. 26, 1999), Exh. Z. Common secondary recovery techniques employed with oil reserves include waterflooding (or water injection) and gas injection. *See* Bill D. Berger & Kenneth E. Anderson, Modern Petroleum (3d ed. 1992) 236, appearing at LEAF Comments (Nov. 26, 1999), Exh. E. Common secondary recovery techniques employed with gas reservoirs include water injection and gas cycling. *See* Introduction to Oil and Gas Technology (Francis A. Guiliano ed., 3d ed. 1989) 137, appearing at LEAF Comments (Nov. 26, 1999), Exh. F.

C § 2.1. Second, EPA determined that a finding that hydraulic fracturing is not "related to" a state's UIC program governing methods to enhance oil and gas production would require states "to seek approval for similar parts of their oil- and gas-related UIC program under *both* section 1425 *and* 1422." 65 Fed. Reg. at 2892 (emphasis added). Such a result, EPA concluded, "would be both inefficient and inconsistent with Congress' expressed admonition that EPA not prescribe unnecessary requirements related to oil- and gas-related injection[.]" *Id.* (citing 42 U.S.C. § 300h(b)(2))."[7] We conclude these reasons are sufficient to support EPA's construction of the SDWA, and therefore hold that EPA's decision to subject hydraulic fracturing to § 1425 approval is based on a permissible construction of the statute.[8]

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[7] The SDWA provides that EPA may not establish requirements "which interfere with or impede . . . any underground injection for the secondary or tertiary recovery of oil or natural gas, unless such requirements are essential to assure that underground sources of drinking water will not be endangered by such injection." 42 U.S.C. § 300h(b)(2)(B).

[8] LEAF's argument to the contrary misses the mark. LEAF acknowledges that the purpose of the injection is the same, *i.e.*, the recovery of the gas. However, LEAF asserts that the means of achieving that purpose and the implications for contamination of underground sources of drinking water are different. Based on these differences, LEAF concludes that the injection of hydraulic fracturing fluids to enhance the recovery of methane gas from coal beds is not analogous to secondary or tertiary recovery of natural gas. We agree that certain distinctions exist between hydraulic fracturing and secondary and tertiary recovery, and that these distinctions would prevent EPA from treating hydraulic fracturing as identical to secondary and tertiary recovery of natural gas. We do not agree, however, that the distinctions necessarily foreclose EPA from concluding that the two activities are analogous or related activities.

B. EPA's Classification of Hydraulic Fracturing of Coal Beds to Produce Methane Gas as a "Class II-like underground injection activity"

1. Regulatory Framework

The original promulgation of UIC regulations in 1979 established a classification system for underground injection wells. Under this classification system, all underground injection wells subject to the SDWA fit within the five well classes in EPA's well-classification scheme. *See* 40 C.F.R. §§ 144.6 & 146.5; *see also LEAF I*, 118 F.3d at 1470.[9] Classes differ from each other according to the purpose and function of the well and the substance to be injected into it. We summarized the five categories in *LEAF I*:

> Class I wells are wells used to dispose of hazardous, industrial, or municipal wastes beneath underground sources of drinking water. 40 C.F.R. § 144.6(a). Class II wells are "[w]ells which inject fluids: (1) [w]hich are brought to the surface in connection with . . . conventional oil or natural gas production . . .; (2) [f]or enhanced recovery of oil or natural gas; and (3) [f]or storage of hydrocarbons." *Id.* § 144.6(b). Class III wells are wells which inject for extraction of minerals. Class IV wells are wells used to dispose of hazardous or radioactive wastes into or above underground sources of drinking water. *Id.* § 144.6(c) and (d). Class V wells are "[i]njection

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[9] EPA acknowledges that "[a]ll underground injection wells subject to the SDWA fit within the five well classes in EPA's well classification scheme." *See* Brief for Respondent at 27.

> wells not included in Classes I, II, III, or IV." *Id.* § 144.6(e).

Id.

After this Court determined that EPA must regulate hydraulic fracturing of coal bed seams as underground injection under the SDWA, EPA reviewed its well classification definitions to determine how to incorporate hydraulic fracturing into its existing regulations. *See* 65 Fed. Reg. at 2891-92. EPA noted, at the outset, that of the five well classes, hydraulic fracturing of coal beds to produce methane "appeared most closely related to Class II, especially that part of the Class II definition covering wells which inject fluids 'for enhanced recovery of oil or natural gas.'" *Id.* at 2892 (citation omitted). EPA further noted that "[i]t is certainly possible to view the emplacement of fracturing fluids through these methane production wells as designed to enhance the recovery of natural gas by creating fractures through which the methane might flow to the well and up to the surface." *Id.* Ultimately, however, EPA decided against classifying these wells as Class II wells. EPA explained:

> [S]ince the injection of fracture fluids through these wells is often a one-time exercise of extremely limited duration (fracture injections generally last no more than two hours) ancillary to the well's principal function of producing methane, it did not seem entirely appropriate to ascribe Class II status to such wells, for all regulatory purposes, merely due to the fact that, prior to commencing production, they had been fractured.

Id. Instead, EPA concluded that "it is reasonable to view hydraulic fracturing of these production wells as a Class II-like underground activity which, by itself, does not turn these methane production wells into Class II injection wells for purposes of complying with all of the Class II regulatory requirements in Parts 144 and 146." *Id.* Doing so, explained EPA, was "consistent with the Court's mandate that [it] treat hydraulic fracturing of coal beds for methane production as underground injection, while at the same time allowing Alabama the flexibility to fashion an approvable regulatory program addressing hydraulic fracturing which need not mirror all existing requirements in Parts 144 and 146 for Class II wells." *Id.*

2. Standard of Review

LEAF argues that EPA's classification of hydraulic fracturing of coal beds as a "Class II-like underground injection activity" is plainly erroneous and inconsistent with the language of 40 C.F.R. § 144.6. According to LEAF, wells used for hydraulic fracturing are Class II wells and should be regulated as such. In construing administrative regulations, we must give "controlling weight" to the agency interpretation "unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S. Ct. 1215, 1217 (1945); *see also Wright v. Director, Fed. Emergency Mgmt. Agency*, 913 F.2d 1566, 1571-72 (11th Cir. 1990). Thus, we will give effect to the agency's interpretation so long as it is "reasonable," *Ehlert v. United States*, 402 U.S. 99, 105, 91 S. Ct. 1319, 1323 (1971), that is, so long as the interpretation "sensibly conforms to the purpose and wording of the regulations." *N. Indiana Pub. Serv. Co. v. Porter County Chapter of Izaak Walton League of Am., Inc.*, 423 U.S. 12, 15, 96 S. Ct. 172, 174 (1975). We will afford

the agency interpretation such deference even if this interpretation is not "the best or most natural one by grammatical or other standards." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 702, 111 S. Ct. 2524, 2537 (1991) (citation omitted).

3. Classifying Hydraulic Fracturing of Coal Beds

An "injection well" is defined as "a 'well' into which 'fluids' are being injected." 40 C.F.R. § 144.3. As we noted in *LEAF I*, "[t]here is no dispute that methane gas production wells, which are initially used for hydraulic fracturing, are 'wells' within the meaning of the statute and regulations. Similarly, there is no dispute that the materials used in hydraulic fracturing are 'fluids' within the meaning of the statute and regulations." *LEAF I*, 118 F.3d at 1474 n.9. It follows that wells used for the injection of hydraulic fracturing fluids must fall into one of the five classes set forth in 40 C.F.R. § 144.6. *See LEAF I*, 118 F.3d at 1470 ("The state also must classify injection wells in conformance with the classification system promulgated by EPA in 40 C.F.R. § 144.6.").

In addition, LEAF argues that the plain language of the regulations demands that wells used for the injection hydraulic fracturing fluids be classified as Class II wells. LEAF notes that 40 C.F.R. § 144.6 classifies as Class II injection wells "wells which inject fluids . . . for enhanced recovery of oil and natural gas[,]" and EPA acknowledges that "[h]ydraulic fracturing of coal beds is a temporary and intermittent process in which *fluids* are *injected underground* at high pressures to create fractures in the coals seam that *enhance the recovery* of methane gas by creating pathways for the gas to flow to the surface." 65 Fed. Reg. at 2892 (emphasis added). LEAF thus

concludes that these wells cannot be classified as anything but Class II wells.

In considering LEAF's argument, we do not take lightly our obligation to defer to an agency's reasonable interpretation of its own regulations, particularly when, as here, the statute "has produced a complex and highly technical regulatory program." *Pauley*, 501 U.S. at 697, 111 S. Ct. at 2534. In this case, however, we cannot avoid the conclusion that EPA's construction of its classification scheme runs afoul of the plain language of the regulations and is therefore contrary to law. Where the classification system sets forth five classes, one of which serves as a catch-all for any well not covered by the first four, EPA must classify hydraulic fracturing into one of those categories. Moreover, as LEAF correctly notes, wells used for the injection of hydraulic fracturing fluids fit squarely within the definition of Class II wells. Accordingly, they must be regulated as such.[10]

EPA's arguments to the contrary are unpersuasive. First, EPA's focus on the duration of the underground injection is misplaced. The fact that hydraulic fracturing is of limited duration and ancillary to the principal function of the well does not exempt it from the well five-class well classification system.[11] Nor is the duration

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[10] At no point has EPA argued to this Court that wells used for the injection of hydraulic fracturing fluids could properly be categorized as Class V wells. We thus do not consider this possibility.

[11] In *LEAF I*, we recognized the limited duration of hydraulic fracturing and stated that EPA "may elect to subject methane gas to regulation . . . only during the process of hydraulic fracturing and not during gas production." 118 F.3d at 1475 n.11. EPA, however, chose not to do so, and instead elected to exempt the wells from certain Class II regulatory requirements by not properly classifying the wells

of the underground injection a factor addressed by the definition of Class II wells in 40 C.F.R. § 144.6. Second, EPA's argument that LEAF has failed to provide any evidence, either in the text or legislative history of the SDWA, that Congress intended to apply its well classification scheme rigidly turns traditional notions of statutory construction on their head. Where, as here, the plain language of the regulation does not permit the construction imposed on it by EPA, EPA cannot justify its interpretation by pointing to the absence of a statutory command to enforce the regulations rigidly. Nor can EPA salvage such an inconsistent interpretation by references to legislative history.[12]

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at all. Nothing in our opinion in *LEAF I* supports EPA's action in this regard.

[12] In addition to the arguments advanced above, EPA asserts that "full" Class II status for hydraulic fracturing would unnecessarily impede gas production in Alabama in contravention of 42 U.S.C. § 300(b)(2). EPA explains that, in Alabama, hydraulic fracturing of coal beds to enhance methane production occurs in the Pottsville aquifer, which qualifies as an underground source of drinking water (USDW). EPA argues that because Class II wells are prohibited from injecting in USDWs, the application of full Class II status to wells used to inject hydraulic fluids could stop or substantially delay coal bed methane gas production in Alabama.

LEAF challenges this argument as both an impermissible, *post hoc* rationalization, *see Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50, 103 S. Ct. 2856, 2870 (1983), and incorrect as a matter of law. We need not determine whether this rationale is indeed *post hoc* because, even assuming it were not, this rationale does not defeat the plain language and structure of the regulations, which require that all injection wells be classified as Class I, II, III, IV, or V wells. Additionally we note that, as EPA recognizes, well operators may apply for an aquifer exemption, *see* 40 C.F.R. §§ 144.7, 146.3, which, if granted, would permit hydraulic fracturing of coal beds in the Pottsville Formation.

In sum, we conclude that EPA's decision to classify hydraulic fracturing of coal beds to produce methane as a "Class II-like underground injection activity" is inconsistent with the plain language of 40 C.F.R. § 144.6. Therefore, EPA's classification must be set aside. *See Mullins Coal Co., Inc. of Virginia v. Director*, 484 U.S. 135, 170, 108 S. Ct. 427, 445 (1987) (Marshall, J., dissenting) ("[D]eference has its bounds. It is not a license for an agency effectively to rewrite a regulation through interpretation. An agency must abide by its regulations as written until it rescinds or amends them."). Accordingly, we remand to EPA to determine whether Alabama's revised UIC program complies with the requirements for Class II wells.

C. Alabama's Revised UIC Program and the SDWA Requirements

Under the alternative method for program approval set forth in § 1425, a state must show that its UIC program meets the requirements of SDWA §§ 1421(b)(1)(A)-(D) and "represents an effective program (including adequate recordkeeping and reporting) to prevent underground injection which endangers drinking water sources." 42 U.S.C. § 300h-4(a). Accordingly, in order to receive approval for its Class II program under the optional demonstration, a state must make a successful showing that its program meets the following five conditions: (1) the program prohibits any underground injection in such State which is not authorized by permit or rule, *see* SDWA § 1421(b)(1)(A) (codified at 42 U.S.C. § 300h(b)(1)(A)); (2) the program requires that (i) the applicant for a permit "must satisfy the State that the underground injection will not endanger drinking water sources," and (ii) "no rule may be promulgated which authorizes any underground

injection which endangers drinking water sources[,]" *id.* § 1421(b)(1)(B) (codified at 42 U.S.C. § 300h(b)(1)(B)); (3) the program "include[s] inspection, monitoring, recordkeeping, and reporting requirements[,]" *id.* § 1421(b)(1)(C) (codified at 42 U.S.C. § 300h(b)(1)(C)); (4) the program applies to (i) "underground injections by Federal agencies, and (ii) to underground injections by any other person whether or not occurring on property owned or leased by the United States[,]" *id.* § 1421(b)(1)(D) (codified at 42 U.S.C. § 300h(b)(1)(D)); and (5) the program represents an "effective program . . . to prevent underground injection which endangers drinking water sources[,]" *id.* § 1425(a) (codified at 42 U.S.C. § 300h-4(a)).

LEAF contends that, even if EPA properly approved Alabama's revised UIC program under SDWA § 1425, EPA's conclusion that the program meets the statutory criteria in that section is arbitrary and capricious. In reviewing the reasonableness of an agency's decision-making process under the arbitrary and capricious standard of the Administrative Procedure Act (APA), *see* 5 U.S.C. § 706(2)(A), we are mindful that a party seeking to have a court declare an agency action to be arbitrary and capricious carries "a heavy burden indeed." *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 714 (D.C. Cir. 2000). As a reviewing court, we "may not substitute [our] judgment for that of the agency and can set aside an agency's decision only if the agency relied on improper factors, failed to consider important relevant factors, or committed a clear error of judgment that lacks a rational connection between the facts found and the choice made." *Arango v. U.S. Dep't of the Treasury*, 115 F.3d 922, 928 (11th Cir. 1997) (internal quotation marks and citations omitted). Applying this deferential standard, we reject LEAF's argument that

EPA's rule arbitrarily determines that Alabama's UIC program complies with the statutory requirements.[13]

III. CONCLUSION

For the reasons discussed above, we DENY IN PART and GRANT IN PART the petition for review and REMAND for proceedings consistent with this opinion.

---

[13] LEAF advances four arguments to support its contention. First, LEAF acknowledges that Alabama's revised UIC program provides for "written approval of the Supervisor," Ala. Admin. Code R. 400-4-5-.04(4), but argues that the "written approval of the Supervisor" is not the functional equivalent of a permit and therefore fails to meet the requirement of 42 U.S.C. § 300h(b)(1)(A). Second, LEAF agues that Alabama's revised UIC program fails to require that a permit applicant satisfy the state that underground injection will not endanger underground sources of drinking water, as required by 42 U.S.C. § 300h(b)(1)(B). Third, LEAF argues that Alabama's revised UIC program does not apply to all persons, as required by 42 U.S.C. § 300h(b)(1)(D). Fourth, LEAF argues that Alabama's revised UIC control program does not represent an effective program to prevent underground injection which endangers drinking water sources, as required by 42 U.S.C. § 300h-4(a)(2). We have carefully considered each argument and conclude that none of these arguments would support setting aside the agency's determination in this case.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAR 18, 2002
THOMAS H. KAHN
CLERK

FOR THE ELEVENTH CIRCUIT

No. 00-10381-DD

LEGAL ENVIRONMENTAL ASSISTANCE FOUNDATION, INC.,

Petitioner,

versus

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

Petition for Review of a Final Order of the Environmental Protection Agency

---

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19___, _____F.2d _____).

Before: BLACK and MARCUS, Circuit Judges, and HANCOCK*, District Judge

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court, having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Susan H. Black
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

*Honorable James H. Hancock, U.S. District Judge for the Northern District of Alabama, sitting by designation.

APPENDIX C

SAFE DRINKING WATER ACT

42 U.S.C. § 300h. - Regulations for State programs

(a) Publication of proposed regulations; promulgation; amendments; public hearings; administrative consultations

(1) The Administrator shall publish proposed regulations for State underground injection control programs within 180 days after December 16, 1974. Within 180 days after publication of such proposed regulations, he shall promulgate such regulations with such modifications as he deems appropriate. Any regulation under this subsection may be amended from time to time.

(2) Any regulation under this section shall be proposed and promulgated in accordance with section 553 of title 5 (relating to rulemaking), except that the Administrator shall provide opportunity for public hearing prior to promulgation of such regulations. In proposing and promulgating regulations under this section the Administrator shall consult with the Secretary, the National Drinking Water Advisory Council, and other appropriate Federal entities and with interested State entities.

(b) Minimum requirements; restrictions

(1) Regulations under subsection (a) of this section for State underground injection programs shall contain minimum requirements for effective programs to prevent underground injection which endangers drinking water sources within the meaning of subsection (d)(2) of this section. Such regulations shall require that a State program, in order to be approved under section 300h-1 of this title -

(A) shall prohibit, effective on the date on which the applicable underground injection control program takes effect, any underground injection in such State which is not authorized by a permit issued by the State (except that the regulations may permit a State to authorize underground injection by rule);

(B) shall require

(i) in the case of a program which provides for authorization of underground injection by permit, that the applicant for the permit to inject must satisfy the State that the underground injection will not endanger drinking water sources, and

(ii) in the case of a program which provides for such an authorization by rule, that no rule may be promulgated which authorizes any underground injection which endangers drinking water sources;

(C) shall include inspection, monitoring, recordkeeping, and reporting requirements; and

(D) shall apply

(i) as prescribed by section 300j-6(b) agencies, and

(ii) to underground injections by any other person whether or not occurring on property owned or leased by the United States.

(2) Regulations of the Administrator under this section for State underground injection control programs may not prescribe requirements which interfere with or impede -

(A) the underground injection of brine or other fluids which are brought to the surface in connection with oil or natural gas production or natural gas storage operations, or

(B) any underground injection for the secondary or tertiary recovery of oil or natural gas, unless such requirements are essential to assure that underground sources of drinking water will not be endangered by such injection.

(3) (A) The regulations of the Administrator under this section shall permit or provide for consideration of varying geologic, hydrological, or historical conditions in different States and in different areas within a State.

(B) (i) In prescribing regulations under this section the Administrator shall, to the extent feasible, avoid promulgation of requirements which would unnecessarily disrupt State underground injection control programs which are in effect and being enforced in a substantial number of States.

(ii) For the purpose of this subparagraph, a regulation prescribed by the Administrator under this section shall be deemed to disrupt a State underground injection control program only if it would be infeasible to comply with both such regulation and the State underground injection control program.

(iii) For the purpose of this subparagraph, a regulation prescribed by the Administrator under this section shall be deemed unnecessary only if, without such regulation, underground sources of drinking water will not be endangered by an underground injection.

(C) Nothing in this section shall be construed to alter or affect the duty to assure that underground sources of drinking water will not be endangered by any underground injection.

(c) Temporary permits; notice and hearing

(1) The Administrator may, upon application of the Governor of a State which authorizes underground injection by means of permits, authorize such State to issue (without regard to subsection (b)(1)(B)(i) of this section) temporary permits for underground injection which may be effective until the, expiration of four years after December 16, 1974, if -

(A) the Administrator finds that the State has demonstrated that it is unable and could not reasonably

have been able to process all permit applications within the time available;

(B) the Administrator determines the adverse effect on the environment of such temporary permits is not unwarranted;

(C) such temporary permits will be issued only with respect to injection wells in operation on the date on which such State's permit program approved under this part first takes effect and for which there was inadequate time to process its permit application; and

(D) the Administrator determines the temporary permits require the use of adequate safeguards established by rules adopted by him.

(2) The Administrator may, upon application of the Governor of a State which authorizes underground injection by means of permits, authorize such State to issue (without regard to subsection (b)(1)(B)(i) of this section), but after reasonable notice and hearing, one or more temporary permits each of which is applicable to a particular injection well and to the underground injection of a particular fluid and which may be effective until the expiration of four years after December 16, 1974, if the State finds, on the record of such hearing -

(A) that technology (or other means) to permit safe injection of the fluid in accordance with the applicable underground injection control program is not generally available (taking costs into consideration);

(B) that injection of the fluid would be less harmful to health than the use of other available means of disposing of waste or producing the desired product; and

(C) that available technology or other means have been employed (and will be employed) to reduce the volume and toxicity of the fluid and to minimize the potentially adverse effect of the injection on the public health.

(d) "Underground injection" defined; underground injection endangerment of drinking water sources
For purposes of this part:

(1) The term "underground injection" means the subsurface emplacement of fluids by well injection. Such term does not include the underground injection of natural gas for purposes of storage.

(2) Underground injection endangers drinking water sources if such injection may result in the presence in underground water which supplies or can reasonably be expected to supply any public water system of any contaminant, and if the presence of such contaminant may result in such system's not complying with any national primary drinking water regulation or may otherwise adversely affect the health of persons.

42 U.S.C. § 300h-4. - Optional demonstration by States relating to oil or natural gas

(a) Approval of State underground injection control program; alternative showing of effectiveness of program by State
For purposes of the Administrator's approval or disapproval under section 300h-1 of this title of that portion of any State underground injection control program which relates to -

(1) the underground injection of brine or other fluids which are brought to the surface in connection with oil or natural gas production or natural gas storage operations, or

(2) any underground injection for the secondary or tertiary recovery of oil or natural gas, in lieu of the showing required under subparagraph (A) of section 300h-1(b)(1) of this title the State may demonstrate that such portion of the State program meets the requirements of subparagraphs (A) through (D) of section 300h(b)(1) of this title and represents an effective

program (including adequate recordkeeping and reporting) to prevent underground injection which endangers drinking water sources.

(b) Revision or amendment of requirements of regulation; showing of effectiveness of program by State

If the Administrator revises or amends any requirement of a regulation under section 300h of this title relating to any aspect of the underground injection referred to in subsection (a) of this section, in the case of that portion of a State underground injection control program for which the demonstration referred to in subsection (a) of this section has been made, in lieu of the showing required under section 300h-1(b)(1)(B) of this title the State may demonstrate that, with respect to that aspect of such underground injection, the State program meets the requirements of subparagraphs (A) through (D) of section 300h(b)(1) of this title and represents an effective program (including adequate recordkeeping and reporting) to prevent underground injection which endangers drinking water sources.

(c) Primary enforcement responsibility of State; voiding by Administrator under duly promulgated rule

(1) Section 300h-1(b)(3) of this title shall not apply to that portion of any State underground injection control program approved by the Administrator pursuant to a demonstration under subsection (a) of this section (and under subsection (b) of this section where applicable).

(2) If pursuant to such a demonstration, the Administrator approves such portion of the State program, the State shall have primary enforcement responsibility with respect to that portion until such time as the Administrator determines, by rule, that such demonstration is no longer valid. Following such a determination, the Administrator may exercise the authority of subsection (c) of section 300h-1 of this title in

the same manner as provided in such subsection with respect to a determination described in such subsection.

(3) Before promulgating any rule under paragraph (2), the Administrator shall provide opportunity for public hearing respecting such rule.

Supreme Court, U.S.
FILED

AUG 19 2002

OFFICE OF THE CLERK

(2)

No. 01-1846

In The

SUPREME COURT OF THE UNITED STATES

October 2001 Term

LEGAL ENVIRONMENTAL ASSISTANCE FOUNDATION, INC.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent,

and

STATE OIL AND GAS BOARD OF ALABAMA,
Intervenor.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Did the United States Eleventh Circuit Court of Appeals correctly affirm the determination by the United States Environmental Protection Agency pursuant to Section 1425 of the Safe Drinking Water Act that Alabama's Underground Injection Control Program represents an effective program to prevent underground injection which endangers drinking water sources?

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COUNTER-STATEMENT OF THE CASE

Since the earliest underground mining of coal in Alabama during the nineteenth century, coal miners faced dangers from underground explosions caused by methane gas. R. File Folder 6, § 12. Recovery of methane gas was initiated in the 1980's to degasify coalbeds to allow underground mining without the danger of methane gas explosions. *Id.* Since the commencement of coalbed methane recovery operations in Alabama, operators have begun to drill and produce coalbed methane gas that is unrelated to coal mining. R. File Folder 6, § 12. Nearly 5,000 coalbed methane wells had been drilled in Alabama at the time of the EPA hearings conducted in connection with Alabama's revised Underground Injection Control Program under review. R. File Folder 6, § 9.

Beginning in the early 1980's, Alabama's coalbed methane industry utilized the technique of hydraulic fracturing to stimulate gas production. R. File Folder 6, § 12.

In 1974, Congress enacted the Safe Drinking Water Act for the purpose of protecting underground sources of drinking water. 42 U.S.C. § 300h. Under the Safe Drinking Water Act, EPA may approve a state for primary enforcement responsibility for underground injection activities within that state. 42 U.S.C. § 300h-1.

In 1980, Congress amended the Safe Drinking Water Act in order to provide an alternative for the states to obtain primary responsibility for oil and gas Underground Injection Control (hereinafter referred to as "UIC") programs. Section 1425 of the Safe Drinking Water Act, codified at 42 U.S.C. § 300h-4. On August 2, 1982, EPA granted the State Oil and Gas Board of Alabama (hereinafter referred to as "Board") responsibility or "primacy" for its UIC Program under Section 1425 of the Safe Drinking Water Act. *Legal*

Environmental Assistance Foundation v. Environmental Protection Agency, 118 F.3d 1467, 1470 (11th Cir. 1997).

In 1997, on appeal of an EPA order, the United States Eleventh Circuit Court of Appeals held that hydraulic fracturing constitutes injection under the Safe Drinking Water Act. *Id.*

In response to the order of the Eleventh Circuit, the Board conducted hearings and then adopted new regulations specifically addressing and regulating hydraulic fracturing of coalbed methane wells. The Board submitted its revised UIC Program to EPA, and on January 19, 2000, EPA issued its final rule approving Alabama's Class II UIC Program revision as administered by the Board. On January 25, 2000, the Legal Environmental Assistance Foundation, Inc. (hereinafter referred to as "LEAF") filed a Petition for Review of a Final Order of EPA in the United States Court of Appeals for the Eleventh Circuit. The Board filed a Motion to Intervene, and the Board's Motion was granted by Order of the Eleventh Circuit Court of Appeals.

On December 21, 2001, after hearing oral argument, the United States Eleventh Circuit Court of Appeals issued its decision that denied in part and granted in part the petition of LEAF. *LEAF v. EPA and State of Alabama Oil and Gas Board*, 276 F.3d 1253, 1264 (11th Cir. 2001).

In its decision, the Eleventh Circuit ruled that (1) Alabama's revised UIC Program is governed under Section 1425 of the Safe Drinking Water Act, codified at 42 U.S.C. § 300h-4 (LEAF has not appealed the Court's ruling on this issue); and (2) Alabama's UIC Program complies with the statutory requirements of Section 1425 of the Safe Drinking Water Act. Further, the Eleventh Circuit remanded the case in part to EPA ruling that EPA's decision to classify hydraulic fracturing of coal beds as a "Class II-like

underground injection activity" is inconsistent with the EPA regulations. *Id.*

On June 12, 2002, LEAF filed a Petition for Writ of Certiorari to the United States Supreme Court.

REASONS FOR DENYING THE WRIT

I. There is no substantial federal question raised with the Court in the Petition for Writ of Certiorari.

LEAF contends the Court erred in affirming EPA's determination that Alabama's UIC Program complies with the statutory requirements of the Safe Drinking Water Act. In the case below, EPA's determination applied only to the Alabama UIC Program and not to programs in other states. The program under review is a program unique to Alabama. No other state has a UIC Program identical to the Alabama program. A ruling by the Court would, therefore, address only one state's UIC Program.

Further, a ruling by the Supreme Court on the petition would merely address an alleged error in the decision of the Eleventh Circuit; i.e., LEAF's allegation that the Court erred in not requiring operators of coalbed methane wells to satisfy the state that the proposed injection of hydraulic fracturing fluids would not result in the presence of any contaminant in underground sources of drinking water (hereinafter referred to as "USDW") that may affect the health of persons. The United States Supreme Court has stated that the "Court's review . . . is discretionary and depends on numerous factors *other than the perceived correctness of the judgment*" under review. *Ross v. Moffitt*, 417 U.S. 600, 617 (1974) (emphasis added).

By granting certiorari in this case, the United States Supreme Court would simply be reviewing the same facts considered by EPA, which were subsequently reviewed by

the Eleventh Circuit Court of Appeals to determine whether Alabama's UIC Program represents an effective program to prevent underground injection that endangers drinking water sources. The United States Supreme Court has stated that it will not exercise jurisdiction to decide a question that turns solely upon an analysis of the particular facts. *United States v. Johnston*, 268 U.S. 220, 227 (1925). As the United States Supreme Court stated in *Berenyi v. Immigration Service*, 385 U.S. 630, 636 (1967), "This Court possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues." This principle is particularly applicable to this case. The decision whether the Alabama UIC Program represents an effective program to prevent underground injection that endangers drinking water sources turns on the particular facts in the case. The Eleventh Circuit "carefully considered each argument and conclude[d] that none of these arguments would support setting aside the agency's determination in this case." *LEAF*, 276 F.3d at 1265, note 13.

This case does not present the basis for a far-reaching decision of general public significance by the United States Supreme Court.

II. The United States Court of Appeals correctly held that Alabama's Underground Injection Control Program represents an effective program to prevent underground injection that endangers drinking water sources.

The Eleventh Circuit "reject[ed] LEAF's argument that EPA's rule arbitrarily determines that Alabama's UIC Program complies with the statutory requirements." *LEAF*, 276 F.3d at 1253, 1265.

In affirming EPA's determination, the Court undoubtedly was cognizant of the strict rule adopted by Alabama and approved by EPA. Dr. Donald Oltz, Alabama State Geologist, described the Alabama regulations as "the

strictest and most comprehensive regulations of any state in the nation." R. File Folder 6, § 11, Public Hearing Transcript, p. 36.

The following is a summary of the Alabama UIC Program addressing hydraulic fracturing[1]:

1. The program requires written approval of any fracturing operation. *State Oil and Gas Board of Alabama Administrative Code* Rule 400-3-8-.03(5).
2. The Board's technical staff of geologists and engineers reviews each fracturing proposal. *State Oil and Gas Board of Alabama Administrative Code* Rule 400-3-8-.03(6).
3. The Board's technical staff evaluates the construction of the coalbed methane gas wells to ensure that each well is constructed with proper casing and cement in order "to prevent upward movement of fluids during fracturing operations." *State Oil and Gas Board of Alabama Administrative Code* Rule 400-3-8-.03(6)(b)(2),(c)2. Any well that fails to comply with requirements for well construction "shall not be allowed to produce and may be required to be immediately plugged and abandoned." *State Oil and Gas Board of Alabama Administrative Code* Rule 400-3-8-.03(6)(a)(2).
4. The technical staff reviews well logs to ensure that impervious strata overlie the uppermost coal bed being fractured to form a barrier to the upward movement of fluids to protect underground sources of drinking water. *State Oil and Gas Board of Alabama Administrative Code* Rule 400-3-8-.03(6)(a)5.

---

[1] The regulations that constitute the Alabama UIC Program are set forth in the Appendix to this brief.

5. The Alabama regulations bar hydraulic fracturing of coal beds shallower than 300 feet. *State Oil and Gas Board of Alabama Administrative Code* Rule 400-3-8-.03(6)(d).

6. Proposals for fracturing of coal beds between 300 and 749 feet provide for a review of fresh-water supply wells within a quarter-mile radius of the coalbed methane gas well. *State Oil and Gas Board of Alabama Administrative Code* Rule 400-3-8-.03(6)(c)3.

7. The regulations require that operators certify that fracturing fluids not exceed the federal maximum contaminant levels. *State Oil and Gas Board of Alabama Administrative Code* Rule 400-3-8-.03(3).

The Alabama program, with its layers of protection, has been effective. Dr. Donald F. Oltz, Alabama State Geologist, testified as follows at the EPA hearings:

> I am aware of no case in Alabama where hydraulic fracturing has caused the contamination of any underground sources of drinking water. Furthermore, it is doubtful that hydraulic fracturing will cause the contamination of any underground sources of drinking water. . . . [E]ssentially all the fluids utilized in a hydraulic fracturing operation are recovered from the formation and removed from the well after the fracturing operation is completed.

R. File Folder 6, § 11, Public Hearing Transcript, pp. 34, 35.

LEAF's principal argument in the Petition is that Alabama's approved program does not provide that operators of coalbed methane wells must satisfy the state that their proposed hydraulic fracturing will not result in the presence

of any contaminant in USDW that may adversely affect the health of persons. LEAF's argument ignores that Alabama's UIC Program prohibits the presence of a "contaminant" that "adversely affect[s] the health of persons." *State Oil and Gas Board of Alabama Administrative Code* Rule 400-3-8-.03(2). Specifically the Board's regulations provide that:

> Coal beds shall not be hydraulically fractured in a manner that allows the movement of fluid containing any contaminant into a USDW, if the presence of that contaminant may . . . otherwise adversely affect the health of persons.
>
> *Id.*

When Congress amended the Safe Drinking Water Act in 1980, Congress provided an alternative for the states to obtain primary responsibility ("primacy") for oil and gas programs. Section 1425 of the Safe Drinking Water Act, codified at 42 U.S.C. § 300h. Congress adopted the 1980 amendment to give the states flexibility in enforcing the Safe Drinking Water Act. EPA guidance information stated that the 1980 amendment to the Safe Drinking Water Act provided "an alternative method for a State to obtain primary enforcement responsibility for those portions of the [UIC] program related to the recovery and production of oil and gas." 46 Fed. Reg. 27333 (1981). Furthermore, in the guidance information,

> EPA is mindful of the fact that, in enacting Section 1425, Congress intended that States be offered an alternative to the detailed requirements of the regulations promulgated at 40 C.F.R. 122, 123, 124, and 146.
>
> *Id.*

EPA's guidance explicitly recognized that "[a] State may choose to apply in a different form and make demonstrations different from those suggested." *Id.*

LEAF argues that the Alabama UIC Program must fail under the Safe Drinking Water Act unless an operator is required to *certify* that the fracturing fluid will not result in the presence of any contaminant in drinking water sources that may adversely affect the health of persons.

Such strict application of the Safe Drinking Water Act is inconsistent with the Act and the regulations promulgated under the Act. LEAF argued the same point before the Eleventh Circuit, and the Court rejected it. The Board's rule approved by EPA (1) requires the operator to certify that the fracture fluids "not exceed the maximum contaminant levels" in the federal regulations for drinking water, and (2) bans fracturing if the fracturing fluid contains a contaminant that may "adversely affect the health of persons." *State Oil and Gas Board of Alabama Administrative Code* Rule 400-3-8-.03(2). This rule complies with the SDWA.

The Eleventh Circuit correctly affirmed the determination by EPA pursuant to Section 1425 of the Safe Drinking Water Act that Alabama's UIC Program represents an effective program to prevent underground injection that endangers drinking water sources.

III. The Court should not issue a Writ of Certiorari to review an appeal of an interlocutory order of a lower court.

The Supreme Court "should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal of an interlocutory order unless it is necessary to prevent extraordinary inconvenience . . . in the conduct of the cause." *American Construction Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U.S. 372, 384 (1893).

In its decision, the U.S. Eleventh Circuit denied the LEAF petition in part and granted the petition in part. *LEAF*, 276 F.3d at 1265. Specifically, the Court remanded the petition "to EPA to determine whether Alabama's revised UIC Program complies with the requirements for Class II wells." *Id.* at 1264. Therefore, LEAF's petition for certiorari is due to be denied because the Eleventh Circuit's decision is not final, and an additional ruling on the remanded issue will be forthcoming.

CONCLUSION

For the reasons stated, the petition for writ of certiorari is due to be denied.

Respectfully submitted,

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APPENDIX

STATE OIL AND GAS BOARD OF ALABAMA ADMINISTRATIVE CODE RULE 400-3-8-.03

400-3-8-.03. Protection of Underground Sources of Drinking Water during the Hydraulic Fracturing of Coal Beds.

(1) Each coal bed shall be hydraulically fractured so as not to endanger any underground source of drinking water (USDW). If hydraulic fracturing operations result in irreparable damage to the coalbed methane gas well, or endanger any USDW, then such well shall be properly plugged and abandoned in accordance with Rule 400-3-4-.14, Plugging and Abandonment of Wells. Furthermore, the remediation of a USDW that has been endangered by hydraulic fracturing operations may be required.

(2) Coal beds shall not be hydraulically fractured in a manner that allows the movement of fluid containing any contaminant into a USDW, if the presence of that contaminant may:

(a) cause a violation of any applicable primary drinking water regulation under 40 C.F.R. § 141; or

(b) otherwise adversely affect the health of persons.

(3) The operator shall certify in writing to the Supervisor that the proposed fracturing operation will not occur in a USDW. Evidence that supports how the determination was made shall accompany such certification and be acceptable to the Supervisor. Otherwise, the operator shall certify in writing to the Supervisor that the mixture of fluids to be used to hydraulically fracture the coal beds does not exceed the maximum contaminant levels contained in 40 C.F.R. § 141 Subparts B and G.

(4) A proposal to fracture a coal group shall be accompanied by a check or bank draft in the amount of one hundred seventy five dollars ($175) payable to the State Treasurer, State of Alabama, which sum is fixed as the fee for each proposal. The fee shall be deposited into the Alabama State Oil and Gas Board Special Fund pursuant to Section 9-17-24 of the Code of Alabama (1975).

(5) Coal beds shall not be hydraulically fractured until the written approval of the Supervisor is obtained. Operators should inform the Supervisor of the proposed coal beds to be hydraulically fractured at the time of complying with the permitting requirements of Rule 400-3-2-.01, Well Permit. Approval of intent to hydraulically fracture coal beds, whether initially or for maintenance purposes, shall be in accordance with Rule 400-3-3-.03, Approval of Activities. In accordance with Rule 400-3-3-.03(2), the Supervisor may send a duly authorized representative to the location to witness the fracturing operation.

(6) The Supervisor shall consider the following procedures and information when evaluating proposals to hydraulically fracture coal beds:

(a) Coal beds below a depth of one thousand (1,000) feet.

1. Special Field Rules shall be reviewed by the Supervisor in order to ensure that coal beds to be fractured are within the depth interval(s) recognized for development by the Board. In the absence of Special Field Rules, the operator shall provide information to the Board accurately delineating the depth interval and nomenclature of the coal beds to be fractured.

2. Construction of the coalbed methane gas well shall be evaluated by the Supervisor to ensure compliance with the requirements of Rule 400-3-4-.09, Casing, Cementing, and

Test Pressure Requirements. Hydraulic fracturing will not be allowed unless the coalbed methane gas well is constructed in accordance with the requirements of Rule 400-3-4-.09. Any coalbed methane gas well that is not constructed in accordance with Rule 400-3-4-.09 shall not be allowed to produce and may be required to be immediately plugged and abandoned.

3. Casing and cementing specifications for the coalbed methane gas well shall be submitted to the Board on Form OGB-7, Well Record and Completion or Recompletion Report. However, if the coalbed methane gas well is in a state of completion or recompletion, and Form OGB-7 is not required to be filed with the Board prior to the fracturing operation, then the Supervisor shall require the operator to submit a wellbore schematic showing the specifications of the casing and cementing program. The depth interval(s) and nomenclature of the coal beds to be fractured must also be shown on the schematic.

4. The Board's Activity Report shall be used to verify the drilling and completion history of the coalbed methane gas well to be fractured. Form OGB-7 and wellbore schematics, if required, will be checked for consistency with the Board's Activity Report.

5. A geophysical log, or gamma ray log, shall be evaluated to determine the type and thickness of strata overlying the uppermost coal bed to be fractured. Impervious strata, such as shale, must overlie the uppermost coal bed and be of sufficient thickness and consistency to serve as a barrier to the upward movement of fluids. Otherwise, a fracturing proposal will be denied.

(b) Coal beds in the depth interval seven hundred fifty (750) to one thousand (1,000) feet.

1. Sections (a)1, (a)2, (a)3, (a)4, and (a)5 of this rule shall be applicable to the evaluation of proposals to hydraulically fracture coal beds in the depth interval seven hundred fifty (750) to one thousand (1,000) feet. Additionally, the Supervisor shall also consider the procedures and information requirements in section (b)2 of this rule when evaluating proposals to hydraulically fracture in this depth interval.

2. If available, a cement bond log (CBL) shall be evaluated to ascertain the top of cement and degree of bonding above the uppermost coal bed to be fractured. A CBL will be the primary tool in determining if the annular space between the production casing and borehole is adequately cemented to prevent upward movement of fluids during fracturing operations. Otherwise, cement volume and yield and borehole size will be used in calculating the top of cement. If not filed previously, operators shall provide the Supervisor with all available information that is necessary in making this determination.

(c) Coal beds in the depth interval three hundred (300) to seven hundred forty nine (749) feet.

1. Section (b)1 of this rule shall be applicable to the evaluation of proposals to hydraulically fracture coal beds in the depth interval three hundred (300) to seven hundred forty nine (749) feet. Additionally, the Supervisor shall also consider the procedures and information requirements in sections (c)2, (c)3, and (c)4 of this rule when evaluating proposals to hydraulically fracture in this depth interval.

2. A CBL shall be evaluated to ascertain the top of cement and degree of bonding above the uppermost coal bed to be fractured. The CBL will be used in determining if the annular space between the production casing and borehole is adequately cemented to prevent upward movement of fluids

during fracturing operations. If a CBL is not available, the Supervisor will not consider a fracturing proposal in the depth interval three hundred (300) to seven hundred forty nine (749) feet.

3. Records of fresh-water supply wells located within a one quarter- (1/4-) mile radius of the coalbed methane gas well shall be used in delineating the construction and completion depth of such supply wells. Published reports maintained in the library of the Geological Survey of Alabama (GSA) and in open-files of the Hydrogeology Division of the GSA shall be the source of information used in this evaluation process. A representative of the Board shall conduct a field reconnaissance within a one quarter- (1/4-) mile radius of the coalbed methane gas well to determine the location of any additional fresh-water supply wells that may not be identified in the previously described documents. If possible, construction information for such additional fresh-water supply wells will be obtained. Consideration shall be given to the records of all fresh-water supply wells available to the Supervisor. Fracturing proposals shall be denied if the Supervisor determines that any fresh-water supply well located within a one quarter- (1/4-) mile radius of the coalbed methane gas well could be adversely impacted in the manner described in section (2) of this rule as a result of the fracturing operation.

4. A program describing the proposed fracturing operation shall be used in conjunction with the evaluation process described in section (c)3 of this rule. Information to be considered shall include, but not be limited to, the maximum length and orientation of the fracture(s) to be propagated and the type fluids and materials that are to be utilized. Programs to hydraulically fracture shall be prepared by a person, or entity, familiar with the technicalities of fracturing coal beds in the area in which fracturing

operations are proposed. Operators shall submit the fracturing program to the Supervisor. Proposals in the depth interval three hundred (300) to seven hundred forty nine (749) feet for which a fracturing program has not been made available to the Supervisor shall be denied. The proposal filed with the Board shall identify the person, or entity, that has prepared the fracturing program and be accompanied by a letter from the operator stating its intended application. Recurrent filing of a fracturing program will not be necessary if such program has previously been approved by the Supervisor and is directly applicable to the fracturing proposal under consideration. Modification(s) to a fracturing program that would alter the maximum length and orientation of the fracture(s) to be propagated, or the type fluids and material to be utilized, shall be approved by the Supervisor prior to its implementation in the field. All approved fracturing programs shall be filed in a central location in the Board's office and shall be maintained as a public record.

(d) Coal beds in the depth interval zero (0) to two hundred ninety nine (299) feet. Hydraulic fracturing of coal beds in the depth interval zero (0) to two hundred ninety nine (299) feet is prohibited.

(6) The Supervisor may request the submittal of additional information not contained in these procedures in order to clarify a proposal to hydraulically fracture a coal bed. Additional information may also be requested in order for the Supervisor to determine if the proposed fracturing operation could endanger any USDW. It shall be the operator's responsibility to furnish such additional information; otherwise, the fracturing proposal shall be denied.

(7) The operator shall maintain all records associated with each proposal approved by the Supervisor and implemented by the operator to hydraulically fracture coal beds. Such records shall be maintained until such time that the coalbed methane gas well has been plugged for permanent abandonment, but not less than three (3) years following completion of the fracturing operation. Upon request, copies of these records shall be made available to the Supervisor.

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No. 01-1846

In the Supreme Court of the United States

LEGAL ENVIRONMENTAL ASSISTANCE FOUNDATION, INC., PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in concluding that the Environmental Protection Agency properly approved the State of Alabama's revised underground injection control program as satisfying the minimum statutory requirements for such state programs under Section 1421(b)(1) of the Safe Drinking Water Act, 42 U.S.C. 300h(b)(1).

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 276 F.3d 1253.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 2001. A petition for rehearing was denied on March 18, 2002 (Pet. App. 24a-25a). The petition for writ of certiorari was filed on June 12, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Pursuant to the Safe Drinking Water Act (SDWA), 42 U.S.C. 300f *et seq.*, the State of Alabama submitted to the Environmental Protection Agency (EPA) a revised program to protect underground sources of drinking water (USDW) from contamination from the underground injection of fluids used to enhance the recovery of natural gas from coal formations. Petitioner objected to EPA's proposed approval of the program. EPA rejected petitioner's objections and promulgated a final rule approving Alabama's revised program. The court of appeals denied petitioner's petition for review in part, granted it in part, and remanded. Pet. App. 2a, 9a-22a.

1. The purpose of the SDWA is to ensure "that water supply systems serving the public meet minimum national standards for protection of public health." H.R. Rep. No. 1185, 93d Cong., 2d Sess. 1 (1974). Part C of the SDWA, 42 U.S.C. 300h to 300h-8, is designed to protect underground sources of drinking water from contamination caused by underground injection of fluids. To achieve that goal, the SDWA establishes a partnership between the federal government and the States. Under this framework, EPA may delegate primary enforcement responsibility for protecting USDW from endangerment that could result from the improper injection of fluids to States that have established an effective underground injection control (UIC) program. States are required to submit to EPA a proposed UIC program that meets minimum statutory requirements. See 42 U.S.C. 300h(b)(1), 300h-1(b)(1)(A)(i); 40 C.F.R. 145.11(b). Upon EPA approval of a State's program, the State assumes primary enforcement and regulatory responsibility for underground injection activities

within its boundaries, and retains that responsibility until EPA determines by rule that the state program no longer meets SDWA minimum requirements. See 42 U.S.C. 300h-1(b)(3).

The SDWA provides two sets of criteria for approval of a State's UIC program. In general, state programs may be approved under the criteria set forth in SDWA Section 1422(b), 42 U.S.C. 300h-1(b). Approval under Section 1422(b) requires a State to show that its UIC program satisfies federal regulations promulgated by EPA under 42 U.S.C. 300h and set forth in 40 C.F.R. Part 145. However, for the portion of a UIC program that relates to certain methods of enhanced oil and natural gas recovery, a State may elect to seek EPA approval under SDWA Section 1425(a), 42 U.S.C. 300h-4(a). Approval under Section 1425 requires a State to demonstrate that its UIC program meets the requirements of SDWA Section 1421(b)(1) (42 U.S.C. 300h(b)(1))[1] and represents an effective program to pre-

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[1] Section 1421(b)(1) provides that, to be approved by EPA, a state program:

> (A) shall prohibit * * * any underground injection in such State which is not authorized by a permit issued by the State (except that the regulations may permit a State to authorize underground injection by rule);
>
> (B) shall require (i) * * * that the applicant for the permit to inject must satisfy the State that the underground injection will not endanger drinking water sources; and (ii) * * * that no rule may be promulgated which authorizes any underground injection which endangers drinking water sources;
>
> (C) shall include inspection, monitoring, recordkeeping, and reporting requirements; and

vent underground injection that endangers drinking water sources. Under the SDWA, endangerment of drinking water sources occurs if underground injection may result in the presence of any contaminant in underground water that supplies or can reasonably be expected to supply any public water system, and the presence of such contaminant either (1) "may result in such system's not complying with any national primary drinking water regulation"[2] or (2) "may otherwise adversely affect the health of persons.". 42 U.S.C. 300h (d)(2); see 40 C.F.R. 144.12(a). This test is referred to as the "endangerment" standard.

2. EPA regulations divide underground injection wells into five classes, of which Class II generally includes wells that inject fluids in connection with oil and gas recovery, production, and storage. Pet. App. 3a n.1, 15a-16a. EPA first approved Alabama's UIC program for Class II underground injection wells in 1982. *Id.* at 3a. That UIC program did not regulate wells that injected hydraulic fracturing[3] fluids to enhance re-

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> (D) shall apply (i) * * * to underground injections by Federal agencies, and (ii) to underground injections by any other person whether or not occurring on property owned or leased by the United States.

42 U.S.C. 300h(b)(1).

[2] National primary drinking water regulations specify the maximum contaminant levels for any contaminant "in water which is delivered to any user of a public water system." 42 U.S.C. 300f(1) and (3). They also establish monitoring and analytical requirements, reporting and recordkeeping requirements, and a variety of other requirements. See 40 C.F.R. Pt. 141.

[3] Hydraulic fracturing is a procedure in which fluids are injected into underground coal beds to create fractures to enhance the recovery of methane gas. The "injection of fracture fluids * * * is often a one-time exercise of extremely limited duration"

covery of methane gas from coal beds. *Ibid.* In 1994, petitioner requested that EPA withdraw approval of the Alabama UIC program, alleging that the program was deficient because it did not regulate such wells. *Id.* at 3a-4a. EPA denied that petition, concluding that because the wells were used principally for the production of methane gas rather than the injection of fracturing fluids, they did not fall within the regulatory definition of "underground injection." *Id.* at 4a. The court of appeals granted petitioner's petition for review, determined that hydraulic fracturing constitutes underground injection under Part C of the SDWA, and held that EPA's contrary interpretation was inconsistent with the plain language of the Act. *Ibid.*; see *Legal Envtl. Assistance Found., Inc.* v. *EPA*, 118 F.3d 1467, 1472, 1478 (11th Cir. 1997).

Petitioner then sought, and the court of appeals issued, a writ of mandamus to enforce the court's mandate. See *In re Legal Envtl. Assistance Found., Inc.*, No. 98-06929 (11th Cir. Feb. 18, 1999) (unpublished). In accordance with the writ of mandamus, EPA initiated proceedings to withdraw its approval of Alabama's program. Pet. App. 4a.

3. Before the withdrawal process was complete, on August 20, 1999, Alabama adopted a rule to regulate hydraulic fracturing of coal beds as part of its Class II UIC program revision package, and submitted the revised program to EPA under SDWA Section 1425(a). Pet. App. 4a-5a. Alabama's rule established standards and procedures to protect against adverse effects of

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and "fracture injections generally last no more than two hours." See *State of Alabama; Underground Injection Control (UIC) Program Revision; Approval of Alabama's Class II UIC Program Revision*, 65 Fed. Reg. 2892 (2000) (EPA final rule).

hydraulic fracturing of coal beds. See Ala. Admin. Code r. 400-3-8-.03 (2002) (*reprinted in* State Oil and Gas Bd. of Ala. Br. in Opp. 10-16).[4] The rule prohibits hydraulic fracturing "in a manner that allows the movement of fluid containing any contaminant into a USDW, if the presence of that contaminant may: (a) cause a violation of any applicable primary drinking water regulation under 40 C.F.R. § 141; or (b) otherwise adversely affect the health of persons." *Id.* r. 400-3-8-.03(2). The rule requires prior written approval before hydraulic fracturing of coal beds (*id.* r. 400-3-8-.03(5)) and imposes recordkeeping requirements on well operators permitted to engage in fracturing. *Id.* r. 400-3-8-.03(7). In order to obtain state approval, a well operator must certify in writing, with supporting evidence, that the proposed fracturing operation will not occur in a USDW, or that the mixture of fluids to be used for fracturing does not exceed the levels specified for drinking water at 40 C.F.R. Part 141 subparts B and G (Ala. Admin. Code r. 400-3-8-.03(3) (2002)); the operator must submit any additional evidence required by the State "in order for the [State] to determine if the

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[4] The provision was originally codified as Rule 400-4-5-.04 (Ala. Admin. Code), and was renumbered after EPA's approval of the program. On September 4, 2001, a new subsection 4 was added to the rule to require operators to submit a fee along with applications to engage in hydraulic fracturing. See *id.* r. 400-3-8-.03(4). Apart from that amendment and conforming renumbering of prior subsections 4 and 5, none of which changes are at issue here, the two versions of the rule are identical. Because pre-existing subsections 6 and 7 were not renumbered at the time of the amendment, the rule now contains two subsections 6. To prevent confusion, references in this brief to subsection 6 will be accompanied by a citation to the page in the State Oil and Gas Board's brief in opposition at which the relevant provision is reprinted.

proposed fracturing operation could endanger any USDW." *Id.* r. 400-3-8-.03(7). The rule imposes progressively stricter standards on wells nearer to the surface, and prohibits fracturing outright at depths of less than 300 feet. *Id.* r. 400-3-8-.03(6)(d); State Oil and Gas Bd. of Ala. Br. in Opp. 15. The rule sets mandatory standards for the construction of coalbed methane gas wells (Ala. Admin. Code r. 400-3-8-.03(6)(a)(2) (2002); State Oil and Gas Bd. of Ala. Br. in Opp. 11-12), and requires that "a fracturing proposal will be denied" unless a mandatory evaluation of strata overlying the uppermost coal bed to be fractured demonstrates that "[i]mpervious strata * * * overlie the uppermost coal bed and [are] of sufficient thickness and consistency to serve as a barrier to the upward movement of fluids." Ala. Admin. Code r. 400-3-8-.03(6)(a)(5) (2002); State Oil and Gas Bd. of Ala. Br. in Opp. 12.

4. In light of the State's revised submission, EPA terminated the withdrawal proceedings. Pet. App. 4a-5a; see *State of Alabama; Underground Injection Control (UIC) Program Revision; Approval of Alabama's Class II UIC Program Revision*, 65 Fed. Reg. 2890 (2000) (EPA final rule). EPA conducted a public hearing and received written comment on its proposed approval of Alabama's revised program. Pet. App. 5a. Petitioner objected, arguing among other things that the rule did not satisfy the standards of Section 1421(b)(1) because it did not prohibit injection of potentially harmful substances that were not subject to national primary drinking water regulations. EPA rejected petitioner's objections, and on January 19, 2000, EPA promulgated a final rule approving Alabama's revised program under SDWA Section 1425(a). See 65 Fed. Reg. at 2889. EPA concluded that "the Alabama program revision includes regulations that are

more stringent than existing Federal regulations for hydraulic fracturing and meets the standards of Section 1425" (*id.* at 2893), and creates "an effective program to prevent underground injection which endangers drinking water sources." *Id.* at 2895.

5. Pursuant to the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, petitioner filed a petition for review of EPA's approval of Alabama's revised program in the court of appeals. See also 42 U.S.C. 300j-7(a)(2). The court of appeals denied the petition in part, granted it in part, and remanded. Pet. App. 1a-23a. The court first rejected petitioner's claim that the State's program for underground injection of hydraulic fracturing fluids could be approved only under Section 1422 of the SDWA and not under Section 1425. The court had "little trouble concluding that EPA's decision to subject hydraulic fracturing to approval under § 1425 rests upon a permissible construction of the [SDWA]." *Id.* at 12a. Second, the court agreed with petitioner's claim that EPA had erred by classifying hydraulic fracturing of coal beds as a "Class II-like underground injection activity" rather than under one of the five classifications of wells explicitly provided by regulation, concluding that that classification was "inconsistent with the plain language of 40 C.F.R. § 144.6." *Id.* at 21a. The court remanded to EPA "to determine whether Alabama's revised UIC program complies with the requirements for Class II wells." *Ibid.*

Finally, the court rejected petitioner's claim that EPA had acted arbitrarily and capriciously by concluding that the Alabama program met the statutory criteria of Section 1421. Pet. App. 22a-23a. Petitioner had argued in part that Alabama's revised UIC program failed to require that a permit applicant satisfy the State that underground injection would not en-

danger underground sources of drinking water, as required by Section 1421(b)(1)(B). *Id.* at 23a n.13. After "carefully consider[ing]" that argument, *ibid.*, the court concluded that petitioner had not met the "heavy burden" of showing that EPA had acted arbitrarily. *Id.* at 22a. The court emphasized that a reviewing court "may not substitute [its] judgment for that of the agency and can set aside an agency's decision only if the agency relied on improper factors, failed to consider important relevant factors, or committed a clear error of judgment that lacks a rational connection between the facts found and the choice made." *Ibid.*

ARGUMENT

The court of appeals correctly concluded that EPA acted reasonably and properly in approving Alabama's UIC program. Petitioner does not contend that that decision conflicts with any decision of this Court or of any other court of appeals, but simply claims that the court misapplied settled law to the facts of this case. That factbound claim lacks merit, and because the court of appeals remanded for further proceedings before EPA, the case is in an interlocutory posture. Further review is not warranted.

1. Petitioner renews its contention (Pet. 9-17) that EPA acted arbitrarily in approving the Alabama UIC program, claiming that the program does not fulfill Section 1421's requirement that a permit applicant must satisfy the State that the underground injection will not endanger drinking water sources. See 42 U.S.C. 300h(b)(1)(B). Although conceding that the Alabama program requires a permit applicant to demonstrate that a fracturing program will not cause an underground drinking water source to exceed national primary drinking water standards (Pet. 14), it contends

that the program does not ensure such operations will satisfy the additional requirement that contaminants will not "otherwise adversely affect the health of persons." Pet. 15 (quoting 42 U.S.C. 300h(d)(2)). Thus, petitioner claims, EPA "fail[ed] to consider a relevant factor" (Pet. 14), and improperly concluded that the Alabama program is an effective program to prevent endangerment of drinking water sources as required by Section 1425(a). That argument is without merit.

Part C of the Safe Drinking Water Act provides that state underground injection control programs must require that "the applicant for [a] permit to inject must satisfy the State that the underground injection will not endanger drinking water sources." 42 U.S.C. 300h (b)(1)(B). Far from "*entirely fail[ing]* to consider" that requirement (*Arkansas* v. *Oklahoma*, 503 U.S. 91, 113 (1992) (emphasis added) (quoting *Motor Vehicle Mfrs. Ass'n of the United States, Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)), EPA specifically addressed it and found that it had been satisfied by the State's program. EPA specifically noted that the Alabama program provides that "[c]oal beds *shall not be hydraulically fractured* in a manner that allows the movement of fluid containing *any contaminant* into a USDW" not only if the presence of the contaminant would violate applicable primary drinking water regulations, but also if it would "*otherwise adversely affect the health of persons.*" 65 Fed. Reg. at 2894 (emphasis added) (quoting Ala. Admin. Code r. 400-4-5-.04(2) (2002) (now *id.* r. 400-3-8-.03(2))); *id.* at 2892; see Ala. Admin. Code r. 400-3-8-.03(1) (2002) ("If hydraulic fracturing operations * * * endanger any USDW, then such well *shall* be properly plugged and abandoned.") (emphasis added). The Alabama program ensures that fracturing operations will comply with that require-

ment because, as EPA noted, "hydraulic fracturing *may not occur*" without "the [State's] written approval signifying that those conditions [set forth in the Rule] are met." 65 Fed. Reg. at 2894 (emphasis added).[5]

Because the Alabama program requires that both of the requirements of the SDWA's "endangerment" standard be satisfied before a fracturing program can be authorized, see 42 U.S.C. 300h(d)(2), the court of appeals properly concluded that EPA did not act arbitrarily when it determined that the Alabama program satisfies the requirements of Section 1421(b)(1) and "represent[s] an effective program that prevents underground injection which endangers drinking water sources." 65 Fed. Reg. at 2894. See generally *Bowman Transp., Inc.* v. *Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974) ("Under the 'arbitrary and capricious' standard the scope of review is a narrow one."); cf. *United States Postal Serv.* v. *Gregory*, 122 S. Ct. 431, 434 (2001) ("the arbitrary and capricious standard is extremely narrow"). There is no reason for this Court to revisit that factbound determination.

2. In addition, review at this time is not appropriate because of the interlocutory posture of the case. The court of appeals "remand[ed] to EPA to determine whether Alabama's revised UIC program complies with the requirements for Class II wells" under 40 C.F.R. Parts 144 and 146. Pet. App. 21a. A fuller administrative record therefore will be developed, which will

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[5] Petitioner therefore errs in its repeated suggestion (Pet. 8, 12-13, 14-15, 15 n.10, 16) that the Alabama program allows for underground injection that would adversely affect the health of persons because some constituents of the injectate are not among the extensive list of substances that are the subject of primary drinking water standards. See 40 C.F.R. Pt. 141.

be subject to further review by the court of appeals. It is possible—although we believe unlikely—that those further proceedings would result in all the relief petitioner seeks. Review by this Court would therefore be premature. *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Respondent,

and

STATE OIL AND GAS BOARD OF ALABAMA,
Intervenor.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT, FILED ON BEHALF OF AMERICAN PETROLEUM INSTITUTE, THE COALBED METHANE ASSOCIATION OF ALABAMA, THE COLORADO OIL & GAS ASSOCIATION, THE DOMESTIC PETROLEUM COUNCIL, THE INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA AND THE US OIL & GAS ASSOCIATION,

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37.2, the American Petroleum Institute, the Coalbed Methane Association of Alabama, the Colorado Oil & Gas Association, the Domestic Petroleum Council, the Independent Petroleum Association of America and the US Oil & Gas Association (collectively "the Proposed *Amici*") respectfully move this Court for leave to file the accompanying brief *amici curiae* in opposition to the Petition for Writ of Certiorari filed by the Legal Environmental Assistance Foundation, Inc. ("LEAF"). Consent for the filing of this brief was granted by counsel of record for Respondent United States Environmental Protection Agency ("EPA") and Intervenor State Oil and Gas Board of Alabama. The consent letter from counsel for EPA has been filed with the clerk's office. Consent was withheld by Petitioner LEAF.

The Proposed *Amici* have a substantial interest in the petition filed by LEAF. LEAF's petition involves the regulation of a technology known as hydraulic fracturing that is used in the production of natural gas and oil. It involves the pumping of water and other fluids into gas or oil wells at high pressures that create fractures in coal seams or other formations which serve as conduits for gas or oil to flow toward the well. LEAF's petition challenges EPA's approval of the rules adopted by the Alabama Oil and Gas Board for the regulation of hydraulic fracturing of certain types of gas wells under the Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j-26 ("SDWA").

The Proposed *Amici* represent the interests of a wide range of companies involved in domestic oil and gas production in the state of Alabama and elsewhere. The members of these associations participate in all sectors of the domestic oil and gas industry, including

production of oil and natural gas. Hydraulic fracturing is increasingly used to enhance production of gas and oil across the country. In fact, in many cases the use of hydraulic fracturing technologies is essential in order to make production of gas from wells economically viable. Accordingly, the members of the Proposed *Amici* rely increasingly on this vital technology in Alabama and elsewhere in order to satisfy the growing demands for domestic energy supplies. LEAF's challenge, if upheld, would affect the way that hydraulic fracturing is regulated in Alabama pursuant to the underground injection control provisions of the SDWA. Therefore, EPA's interpretation of the application of the SDWA to hydraulic fracturing in Alabama is of considerable consequence to the member companies of the Proposed *Amici*.

In addition, the Proposed *Amici* believe that their participation in the case may assist the Court in its review of LEAF's petition. Given the extensive knowledge and experience of their members, the Proposed *Amici* have substantial and unique expertise with respect to both hydraulic fracturing technology and its regulation under the SDWA in Alabama as well as the regulation of hydraulic fracturing activities under various state regulatory programs across the country. The Proposed *Amici* believe that the expertise they offer may assist the Court in understanding the issues raised by LEAF's petition for certiorari and in determining whether that petition is worthy of the Court's review.

For the reasons stated above, the Proposed *Amici* respectfully request that this Court grant their motion for leave to file this brief.

Dated: September 18, 2002

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The American Petroleum Institute, the Coalbed Methane Association of Alabama, the Colorado Oil & Gas Association, the Domestic Petroleum Council, the Independent Petroleum Association of America and the US Oil & Gas Association respectfully file this brief as *amici curiae* in support of the Respondent, United States Environmental Protection Agency ("EPA").[1]

INTEREST OF *AMICI CURIAE*

This case involves the regulation of a technique known as hydraulic fracturing that is used to facilitate the production of natural gas and oil from wells. This technology, which involves the injection of liquids at high pressures into a gas or oil well to create fractures in coal seams or other formations that serve as conduits along which oil or gas can travel to a wellbore, is widely used to increase the productivity of gas and oil wells and is essential in many cases in order to make production of gas or oil from a well economically viable. As a result, many companies that are involved in the domestic production of natural gas and oil are vitally interested in regulatory requirements relating to hydraulic fracturing that may affect the ability of operators of gas and oil wells to make use of this important technology. The *amici* represent these companies that are involved in domestic production of natural gas and oil.

The American Petroleum Institute ("API") represents more than 400 companies involved in all aspects of industry

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[1] No counsel for any party has authored this brief in whole or in part. In addition to the listed *amici*, entities that have made monetary contributions to the preparation and submission of this brief include Columbia Natural Resources, EL Paso Production Company, Equitable Production Company, and the Ohio Oil & Gas Association.

oil and gas operations, including the exploration, production, refining and marketing of oil and gas products. The regulation of hydraulic fracturing activities in Alabama in connection with oil and gas production operations under the Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j-26 ("SDWA"), has had a direct and substantial impact on API members and their efforts to develop domestic energy supplies.

The members of the Coalbed Methane Association of Alabama ("CMAA") are engaged in the development and production of coalbed methane resources in Alabama. Coalbed methane wells in Alabama must generally be hydraulically fractured in order for the well to be a productive source of natural gas. Alabama coalbed methane operators are the only coalbed methane developers in the country currently subject to the regulation of hydraulic fracturing as underground injection under the SDWA. The outcome of this litigation will have a direct effect on the entire membership of CMAA.

The Colorado Oil & Gas Association ("COGA") is the business trade association for the oil and gas industry in Colorado. While COGA's activities are focused primarily on producers of oil and gas, it also represents pipeline operators, processors and power generators. The vast majority of oil and gas wells drilled in Colorado are hydraulically fractured, including those related to gas from tight sands and coal seams in all the state's major basins.

The Domestic Petroleum Council ("DPC") is a national trade association representing 23 of the largest independent natural gas and crude oil exploration and production companies in the United States. The DPC companies are among the most active in applying leading-

edge technology, including hydraulic fracturing, to meet the increasing domestic demand for energy supplies.

The Independent Petroleum Association of America ("IPAA") represents the interests of independent gas and oil producers, which collectively account for approximately 40 percent of America's crude oil production and 65 percent of America's natural gas production. IPAA members drill many domestic natural gas and oil wells in Alabama, more than 50 percent of which require hydraulic fracturing in order to facilitate the production of oil and natural gas supplies. IPAA members therefore have a strong interest in the regulation of hydraulic fracturing in Alabama.

The US Oil & Gas Association has over 3,000 members representing all sectors of the domestic oil and gas industry. The Association's mission is to promote and protect the oil and gas industry. Many of the Association's members are affected by regulatory controls on hydraulic fracturing of oil and gas wells.

SUMMARY OF ARGUMENT

Essentially conceding that there is no conflict among the circuits on the question it presents, petitioner Legal Environmental Assistance Foundation, Inc. ("LEAF") nevertheless asks this Court to review and reject the determinations of EPA and the U.S. Court of Appeals for the Eleventh Circuit regarding a narrow and unremarkable provision of the SDWA. However, the petition for certiorari filed by LEAF is without any merit.

First, LEAF has completely failed to demonstrate that the narrow issue it raises, which concerns one aspect of EPA's approval of Alabama's program for regulating hydraulic fracturing of coalbed methane ("CBM") wells under the SDWA, satisfies the criteria generally used by the

Court in considering whether to grant a petition for certiorari. For example, LEAF has made no effort to demonstrate that the decision of the Eleventh Circuit below is in any way in conflict with a decision of another U.S. court of appeals or a decision of this Court. LEAF has likewise made no allegation that the validity of EPA's determination regarding the compliance of the Alabama program with section 1421 of the SDWA, 42 U.S.C. § 300h, is an important issue of federal law that requires resolution by this Court. This failure by LEAF to address these important considerations is in essence an admission by LEAF that the petition does not satisfy the Court's standards for review and should lead to the conclusion that certiorari is not appropriate in this case.

Furthermore, the Eleventh Circuit was correct in upholding EPA's approval of the Alabama underground injection control ("UIC") program for Class II wells. EPA's determination that Alabama's program for regulating hydraulic fracturing meets the requisite standards for state UIC programs set forth in section 1421(b) of the SDWA, 42 U.S.C. § 300h(b), is the type of technical judgment by a federal regulatory agency that is entitled to substantial deference. Moreover, in enacting section 1425 of the SDWA, *id.* § 300h-4, Congress intended that states should have flexibility in meeting the Act's requirements when establishing programs for regulating activities related to oil and gas production. In light of these standards, EPA's conclusion that Alabama's program satisfies the provision of section 1421(b)(1)(B)(i) of the SDWA, *id.* § 300h(b)(1)(B)(i), which requires operators to demonstrate that their underground injection activities will not endanger underground sources of drinking water, is more than amply

supported by the record. The Eleventh Circuit's decision to affirm EPA's judgment should therefore be upheld.

ARGUMENT

I. LEAF HAS FAILED TO DEMONSTRATE THAT ANY OF THE CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI SUPPORT A GRANT OF THIS PETITION

The question presented for review by LEAF is an exceedingly narrow one, *i.e.*, whether the Eleventh Circuit erred in upholding EPA's approval of Alabama's program for regulating hydraulic fracturing as underground injection under the SDWA. In this Court, LEAF questions only a single aspect of EPA's approval of Alabama's program, arguing that EPA erroneously determined that Alabama's program meets the requirements of section 1421(b)(1)(B)(i) of the SDWA. That provision of the Act specifies that states must require operators of underground injection wells to demonstrate to the state that their underground injection activities will not endanger drinking water sources, which is defined under the Act to include injection activities that result in the presence of contaminants in underground sources of drinking water at levels that may violate national primary drinking water regulations (known as "maximum contaminant levels" or "MCLs") or that may otherwise adversely affect the health of persons. LEAF concedes that the regulations of the Alabama Oil and Gas Board regarding hydraulic fracturing of CBM wells require operators to demonstrate compliance with the MCLs but contends that Alabama's program does not require operators to make a demonstration that hydraulic fracturing activities will not otherwise adversely affect human health. Thus, the question

presented to the Court is a very narrow one regarding a very specific and limited aspect of one state's UIC program.

In making this claim, LEAF has failed to demonstrate that any of the considerations used by the Court in evaluating whether to grant a petition for certiorari in fact support the grant of this petition. According to Rule 10 of the Supreme Court Rules, the Court will grant a writ of certiorari only for compelling reasons. Rule 10 identifies a number of considerations that govern the Court's review of a petition for certiorari, including whether: (a) a U.S. court of appeals has entered a decision that is in conflict with the decision of another U.S. court of appeals on an important matter, or has decided an important federal question in a way that conflicts with a decision by a state court of last resort, or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of the Court's supervisory power; or (b) a U.S. court of appeals has decided an important question of federal law that has not been, but should be, settled by the Court, or has decided an important federal question in a way that conflicts with relevant decisions of the Court.

LEAF's failure to even address the applicability of these considerations in its petition should be seen as an implicit acknowledgement that the question presented by LEAF for review does not meet the Court's standards for review on certiorari. Indeed, a review of these considerations demonstrates that none of the factors identified by the Court as supporting a grant of a petition for certiorari is present in this case.

First, the Eleventh Circuit's decision to uphold the Alabama program does not conflict with any decisions issued by any other U.S. court of appeals or any state court. In fact, the ruling by the court below represented the first

time that a federal court has been called on to consider whether a state UIC program met the requirement of section 1421(b)(1)(B)(i). Therefore, there is no conflict for the Court to resolve.

Similarly, the Eleventh Circuit's decision does not conflict with any decision of this Court in any manner. This Court has not had occasion to interpret the requirements of section 1421 of the SDWA. Moreover, the standards employed by the Eleventh Circuit comport with this Court's decisions concerning judicial review of federal agency action under the Administrative Procedure Act, 5 U.S.C. §§ 701-706. Therefore, there can be no conflict between the Eleventh Circuit's decision and any previous decisions of the Court.

Finally, the issue presented in LEAF's petition is not the sort of "important question of federal law" with respect to which the Court normally grants certiorari.[2] For example, the issue presented for review is not significant to the overall administration of the SDWA as a whole, *cf. United States v. Ruzicka*, 329 U.S. 287 (1946) (issue concerned enforcement authority of Department of Agriculture that affected overall administration of the Agricultural Marketing Agreement Act); the construction of the statute by the lower court is not at odds with a well-established construction given the statute by the administrative agency charged with its enforcement, *cf. Morton v. Ruiz*, 415 U.S. 199, 201-02 (1974); nor is the issue novel or troublesome and involved in numerous pending cases in lower courts, *cf. Laing v. United States*, 423 U.S. 161, 167 (1967).

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[2] "Importance" in this context refers to the importance of the issue to the public as a whole, not its importance to the parties. *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 79 (1955).

Moreover, the dispute in this case does not involve a claim for very large amounts of money, *cf. United States v. Mitchell*, 463 U.S. 206, 211 n.7 (1983) (case involved claim for over $100 million); does not directly affect many individuals, *cf. Patterson v. Lamb*, 329 U.S. 539, 541 (1947) (lower court decision affected thousands of World War I draftees); nor are a large number of administrative actions similar to the one at issue here pending before the Agency, *cf. FTC v. Jantzen, Inc.*, 386 U.S. 228, 229 (1967). Finally, the dispute here does not relate to the nature and scope of obligations between and among the States, *cf. Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 101, 110 (1938); nor does it concern the scope of authority of congressional committees, *cf. United States v. Rumely*, 345 U.S. 41, 42 (1953).

Instead, LEAF's certiorari petition simply challenges one limited and very discrete aspect of an administrative agency's action in approving a single state's comprehensive plan in accordance with the requirements of a federal statute. There is no indication that the decision of the Eleventh Circuit in this case has any relevance whatsoever to the enforcement of the SDWA generally, or that a large number of lower courts and agencies are awaiting resolution of this particular issue, or that there is any other way in which the issue presented in LEAF's certiorari petition can possibly be construed as a matter of important national interest.

Because LEAF has presented no evidence of any conflict between any courts on the issue that LEAF seeks to bring before the Court, and because the subject matter of LEAF's petition is certainly not a matter of national import of the sort that usually serves as the basis for a grant of a petition for certiorari, this Court should deny LEAF's request for certiorari.

II. THE ELEVENTH CIRCUIT'S DECISION WAS CORRECT

The Court should also deny the petition for certiorari because the decision below was correct. The Eleventh Circuit appropriately deferred to EPA's expert judgment that the Alabama program complies with the requirements of the SDWA. EPA in turn correctly concluded that the Alabama program satisfies the requirements of the Act that operators demonstrate that their underground injection activities will not endanger drinking water sources.

A. EPA's Determination Is Entitled to Deference

EPA's determination that the Alabama program meets the requirements of section 1421(b)(1)(B)(i) of the SDWA is entitled to substantial deference. This determination is reviewed under the deferential standards set forth in the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-59, 701-06. Under the APA's deferential standard of review, an agency action cannot be overturned unless it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983).

In addition, the determination regarding the specific steps that a state must take to satisfy the requirements of section 1421(b)(1)(B)(i) has been left by Congress to EPA. In such cases, considerable weight should be accorded to an agency's construction of a statute it is designed to administer. *Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc.*,

467 U.S. 837, 844 (1984). Moreover, in deciding whether a state has taken sufficient steps to require an operator to demonstrate that an underground injection activity will not adversely affect human health, the Agency must utilize its expertise regarding underground sources of drinking water and the effectiveness of various regulatory measures to protect such drinking water sources. In such circumstances, a court must "defer to 'the informed discretion of the responsible federal agencies.'" *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 377 (1989) (*citing Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976)). *See also Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 708 (1995) ("When Congress has entrusted [an agency] with broad discretion, we are especially reluctant to substitute our views of wise policy for [those of the agency]."). Thus, EPA's approval of Alabama's program should not lightly be overturned.

EPA's determination is also entitled to deference because it is a product of a long and careful review process by the Agency. The Alabama Oil and Gas Board adopted its hydraulic fracturing regulations after consulting with EPA and providing the public with an opportunity for comment on the proposed regulations. EPA in turn approved the Alabama regulations only after several public hearings and consideration of extensive and detailed comments submitted by LEAF and others. In approving the Alabama program, EPA provided a detailed explanation of the rationale for its decision and specifically addressed the arguments that LEAF now advances in its petition. 65 Fed. Reg. 2889 (2000). Thus, LEAF's arguments have been carefully considered at every stage of this proceeding.

B. Section 1425 Applies to Hydraulic Fracturing Activities and Provides States with Significant Flexibility in Meeting the Requirements of the SDWA

The Act provides Alabama with significant flexibility in meeting the requirements for UIC programs, including the requirement of section 1421(b)(1)(B)(i). As the court below found, EPA was authorized to review the adequacy of the state's program relating to permitting of hydraulic fracturing activities pursuant to the standards of section 1425 of the Act, 42 U.S.C. § 300h-4. *See Legal Envt'l Assistance Found., Inc. v. U.S. Environmental Protection Agency*, 276 F.3d 1253, 1258-61 (11th Cir. 2001). Section 1425 provides that, in seeking approval of a program for the regulation of certain types of underground injection that are associated with oil and gas development, a state may demonstrate that its program meets the statutory standards for state programs set forth in section 1421(b)(1) and is an effective program to prevent underground injection which endangers drinking water sources and need not demonstrate compliance with each of the specific detailed regulatory requirements promulgated by EPA for UIC programs, *see* 40 C.F.R. Parts 144-146.

Congress enacted section 1425 in 1980 in order to provide oil and gas producing states with some degree of flexibility in meeting the requirements of the Act for approval of state UIC programs. As the House Committee on Interstate and Foreign Commerce noted:

> Most of the 32 states that [already] regulate underground injection related to the recovery or production of oil or natural gas (or both) believe they have programs already in place

> that meet the minimum requirements of the Act including the prevention of underground injection which endangers drinking water sources. This is especially true of the major producing states where underground injection control programs have been underway for years. *It is the Committee's intent that states should be able to continue these programs unencumbered with additional Federal requirements if they demonstrate that they meet the requirements of the Act.*

H.R. Rep. No. 96-1348, at 5 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6080, 6084 (emphasis added). *See also* 126 Cong. Rec. H931 (daily ed. Sept. 20, 1980) (statement of Rep. Broyhill) (section 1425 "should free the producing States which have been doing a good job of regulating underground injection relating to oil and natural gas from the requirements of EPA regulations and allow them to continue their current programs"). Congress further emphasized that state programs relating to oil and gas production should be subject to as little federal control as possible by providing that EPA regulations for UIC programs may not "interfere with or impede" oil and gas production unless such requirements are essential to ensure that underground sources of drinking water will not be endangered. 42 U.S.C. § 300h-1(b)(2).

Consistent with these congressional directives, EPA has long recognized that, in seeking approval of programs pursuant to section 1425, states have flexibility in meeting the standards of section 1421 of the Act. EPA has not issued specific regulations setting forth requirements for such programs, but has instead issued guidance that states may follow in developing programs pursuant to section 1425. *See*

46 Fed. Reg. 27333 (1981). EPA's guidance is "much less detailed" than the regulations that apply to other UIC programs and "leaves a great deal more discretion to the State to develop and EPA to approve State UIC programs under Section 1425." *Id.* at 27334.

Thus, Congress intended that States be given flexibility in meeting the statutory requirements of section 1421 as they apply to activities such as hydraulic fracturing that relate to oil and gas production. LEAF has requested that the Court grant certiorari in order to closely examine the details of an EPA-approved program that was evaluated pursuant to a statutory provision adopted by Congress with the specific purpose of granting the states a substantial degree of latitude in meeting statutory criteria. There is no reason for the Court to conduct such a review.

C. EPA Correctly Determined that Alabama's Program Complies With the Provision of the Act Requiring Applicants to Satisfy the State That Underground Injection Will Not Endanger Drinking Water Sources

In light of these standards, it is evident that EPA's determination that the Alabama program satisfies the requirements of section 1421(b)(1)(B)(i) finds ample support in the record. As noted above, while the Act provides that a well operator must demonstrate that its underground injection activity will not endanger drinking water sources, it does not specify how such a demonstration must be made. Rather, EPA's regulatory guidance provides that such a demonstration may be made in a variety of ways. 46 Fed. Reg. at 27336. The Agency guidance specifies that the burden must remain on the operator to provide the state with sufficient information to determine that the proposed

underground injection will not violate maximum contaminant levels or otherwise adversely affect the health of persons, but provides states with flexibility in determining what information must be submitted by an operator. *Id.* Moreover, the EPA guidance indicates that the state need not require the submission of specific information that is already in the state's files. *Id.*

Consistent with these guidelines, the Alabama program contains numerous provisions that ensure that hydraulic fracturing activities will not adversely affect the health of persons. For example, the Alabama regulations mirror EPA regulations by specifically prohibiting hydraulic fracturing activities that would adversely affect human health. Ala. Admin. Code r. 400-3-8-.03(2). This express prohibition alone should be more than sufficient to protect drinking water sources.

However, the Alabama regulations go even further and do not rely solely on this prohibition against adversely affecting human health in order to satisfy the requisite criteria for approving this program. For example, the regulations contain numerous other key provisions to ensure that hydraulic fracturing activities do not adversely affect public health. These provisions include a prohibition on hydraulic fracturing within 300 feet of the surface, where most drinking water wells are found. *Id.* r. 400-3-8-.03(d). For proposed fracturing activities from 300 to 750 feet below ground surface, an applicant must provide information regarding the locations of nearby drinking water wells and the Alabama Oil and Gas Board is authorized to deny approval of a proposed hydraulic fracturing activity if any such wells could be adversely impacted by the proposed activity. *Id.* r. 400-3-8-.03(c)(3). Moreover, consistent with EPA guidance, such applicants must provide the Board with

a description of the proposed fracturing operation, including the maximum length of the fractures to be created in the coalbed formation and the types of fluids and materials to be used in the fracturing operations. *Id.* r. 400-3-8-.03(c)(4). In addition, all applicants seeking approval of underground injection activities must provide well logs showing that there is an adequate confining layer to prevent upward migration of fracturing fluids. *Id.* r. 400-3-8-.03(a)(5). Applicants must also provide information to the Board concerning the construction of the CBM well that is to be fractured in order to demonstrate that the well itself will not serve as a conduit for the transmission of contaminants from deeper formations where fracturing is to occur to shallower formations where drinking water wells may be found. *Id.* R. 400-3-8-.03(a)(2), (3). These provisions are more than adequate to satisfy the requirements of the SDWA, particularly in light of the fact that there is no evidence that any drinking water wells have ever been contaminated due to hydraulic fracturing activities.[3]

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[3] This lack of evidence of actual contamination has recently been reaffirmed in a draft study released by EPA. U.S. Environmental Protection Agency, *Evaluation of Impacts to Underground Sources of Drinking Water by Hydraulic Fracturing of Coalbed Methane Reservoirs* (2002), *available at* www.epa.gov safewater/uic/cbmstudy.html. EPA has described this study as the most extensive study ever undertaken of the potential impact of the hydraulic fracturing of CBM wells on underground sources of drinking water. The report concludes that the potential threat to underground sources of drinking water posed by hydraulic fracturing of coalbed formations such as occurs in Alabama is low and that, although thousands of coalbed methane wells are hydraulically fractured nationwide on an annual basis, there is no persuasive evidence that any drinking water wells have been contaminated by such fracturing operations. *Id.* at ES-1. In light of this low level of risk, the information regarding proposed hydraulic fracturing operations that operators must submit to the Alabama Oil and Gas Board is more than sufficient for the Board to satisfy itself that such operations will not adversely affect human health.

Thus, LEAF's argument that the Alabama UIC program does not comply with the requirements of section 1421(b)(1)(B)(i) is wholly without merit. This Court should not grant certiorari in order to hear arguments on appeal from a decision to approve the Alabama UIC program that was clearly based on sound decisionmaking.

CONCLUSION

LEAF's petition for certiorari should be rejected for several reasons. First, LEAF's petition does not offer a single justification for granting certiorari under the standards normally applied by the Court. Indeed, LEAF's failure to present such an argument is quite possibly attributable to the fact that LEAF's petition does not resemble in any manner the sort of dispute that the Court normally deems worthy of review. There is no conflict in the lower courts on the issue presented by LEAF, the Eleventh Circuit opinion does not clash with Supreme Court precedent, and LEAF's petition does not present any pressing issue of national concern of the type that might prompt the Court to grant certiorari.

Furthermore, LEAF's substantive position has no merit. The Alabama UIC program complies with the statutory requirements of the SDWA, and EPA was correct to approve the revised program. The Eleventh Circuit rightly deferred to EPA's judgment on this matter and upheld the decision with respect to the program's compliance with the requirements of section 1421(b)(1)(B)(i). Indeed, the Alabama UIC program contains language nearly identical to that found in the relevant SDWA section. LEAF's argument that the Alabama program somehow does not comply with this section is, therefore, wholly without merit. For these reasons, LEAF's petition for certiorari should be denied.

Dated: September 18, 2002

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IN THE

Supreme Court of the United States

LEGAL ENVIRONMENTAL ASSISTANCE FOUNDATION, INC.,
PETITIONER,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT,

and

STATE OIL AND GAS BOARD OF ALABAMA,
INTERVENOR.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COMPELLING REASONS SUPPORT GRANTING THE PETITION

"A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Among them are when the Court of Appeals has decided an important question of federal law that has not been, but should be, settled by the Supreme Court and when the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's supervisory power. Id. Moreover, the reasons identified in Rule 10 are neither controlling nor do they express the full measure of the Court's discretion to grant a writ of certiorari.

In this case, the Court of Appeals decided an important question of federal law that has not been, but should be, settled by the Supreme Court. That question is whether, contrary to the Safe Drinking Water Act, the U.S. Environmental Protection Agency may approve a state underground injection control program where such program does not provide that well operators must satisfy the State that their proposed injection of fluids will not result in the presence of any contaminant in underground sources of drinking water which may adversely affect the health of persons.

There were over 10,000 coalbed methane wells operating in the United States in 1998.[1] The number of coalbed methane wells projected to become operational during the next ten years has increased tremendously.

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[1] Survey Results on Inventory and Extent of Hydraulic Fracturing in Coalbed Methane Wells in the Producing States, Ground Water Protection Council (Dec. 15, 1998) attached to State Oil and Gas Board of Alabama Comments (Nov. 22, 1999).

See e.g., Bureau of Land Management, Notice of Availability of Draft Environmental Impact Statement, 67 Fed. Reg. 6943 (2002) (10,000 wells in the Montana portion of the Powder River Basin); Bureau of Land Management, Notice of Availability of Draft Environmental Impact Statement, 67 Fed. Reg. 1497, 1498 (2002) (51,000 wells in the Wyoming portion of the Powder River Basin). Many of these injection wells permit injection directly into underground sources of drinking water. EPA has approved underground injection control programs in 44 states and territories, including 23 Class II (oil and gas related) underground injection control programs approved under 42 U.S.C. § 300h-4. The national importance of EPA's proper implementation of the Safe Drinking Water Act to the health of the public is obvious. The national importance of EPA's implementation of the Safe Drinking Water Act vis-a-vis the hydraulic fracturing activities of the oil and gas industry is also illustrated by the proposed *Amici*'s interest in this case.

In addition, the Court of Appeals' decision so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's supervisory power. The Safe Drinking Water Act requires that State underground injection control programs, even programs developed and approved under 42 U.S.C. § 300h-4, must require that persons proposing to inject fluids must satisfy the State that their proposed injection will not result in the presence of any contaminant in underground sources of drinking water which may adversely affect the health of persons. 42 U.S.C. §§ 300h(b)(1)(B)(i), 300h(d)(2). EPA approved Alabama's underground injection control program without such a requirement. The Court of Appeals affirmed summarily, departing from the settled

requirements of 5 U.S.C. § 706(2)(a). *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency action is arbitrary if it fails to consider the relevant factors or an important aspect of the problem); *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974) (same); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) (same).

Finally, this is not a case where the Petitioner asserts error consisting of erroneous factual findings or the misapplication of a properly stated rule of law. Rather, the error asserted by Petitioner is the complete failure of the Court of Appeals to apply the law and the complete failure of the EPA to consider a relevant factor in its approval of Alabama's program.

The United States Court of Appeals erred in affirming the U.S. Environmental Protection Agency's approval of Alabama's revised underground injection control program pursuant to 42 U.S.C. § 300h-4.

The Safe Drinking Water Act requires that state underground injection control programs, even oil and gas related programs developed and approved under 42 U.S.C. § 300h-4, must require that persons proposing to inject fluids must satisfy the state that their proposed injection will not result in the presence of any contaminant in underground sources of drinking water which may adversely affect the health of persons. 42 U.S.C. §§ 300h(b)(1)(B)(i), 300h(d)(2). In its approval of Alabama's underground injection control program, EPA explained its consideration of 42 U.S.C. § 300h(b)(1)(B)(i) as follows:

> Section 1421(b)(1)(B)(i) [42 U.S.C. § 300h(b)(1)(B)(i)] is satisfied because, while the Alabama regulation does not establish a permit requirement, Rule 400-4-5-.04(4) [now R. 400-3-8-.03(5)] states: "Coal beds shall not be hydraulically fractured until the written approval of the Supervisor is obtained."

65 Fed. Reg. 2889, 2894 (2000). This mere prohibition against unpermitted injection does not address the statutory requirement that persons proposing to inject fluids must satisfy the state that their proposed injection will not result in the presence of any contaminant in underground sources of drinking water which may adversely affect the health of persons. Thus, it does not rationally support the approval of Alabama's program.

Elsewhere in its approval of Alabama's program, EPA identified the well operator's demonstration burden as follows:

> The State has also adopted additional regulatory provisions preventing underground injection which endangers drinking water sources. State Rule 400-4-5-.04(3) [now R. 400-3-8-.03(3)] states: "The operator shall certify in writing to the Supervisor that the proposed fracturing operation will not occur in a USDW. Evidence that supports how the determination was made shall accompany such certification and be acceptable to the Supervisor. Otherwise, the operator shall certify in writing to the Supervisor that the mixture of fluids to be used to hydraulically fracture the coal beds does not exceed the maximum contaminant levels contained in 40 CFR § 141 Subparts B and G."

> This provision requires a certification that fracturing fluids will not be injected into a USDW or establishes specifications for the quality of the injectate should the injection occur into the USDW. Specifically, it states that the injectate must meet drinking water standards. Therefore, EPA concludes that adequate provisions have been established to prevent endangerment of drinking water sources from hydraulic fracturing operations.

65 Fed. Reg. at 2894-95. Obviously, this demonstration burden is insufficient because it fails to address whether the proposed injection may result in the presence of any contaminant in underground sources of drinking water *which may adversely affect the health of persons. See* 42 U.S.C. § 300h(d)(2). The House Interstate and Foreign Commerce Committee unambiguously rejected the maximum contaminant levels contained in 40 C.F.R. Part 141 Subparts B and G as the sole and sufficient measure of ensuring the protection of human health. The Committee said:

> The Committee was concerned that its definition of 'endangering drinking water sources' also be construed liberally. Injection which causes or increases contamination of such sources may fall within this definition even if the amount of contaminant which may enter the water source would not by itself cause the maximum allowable levels to be exceeded. The definition would be met if injected material were not completely contained within the well, if it may enter either a present or potential drinking water source, and if it (or some form into which it might be converted) may pose a threat to human health or

> render the water source unfit for human consumption.

H. Rep. No. 93-1185, 93rd Cong., 2d Sess. 32, *reprinted in* 1974 U.S.C.C.A.N. 6454, 6484.

EPA, the State Oil and Gas Board of Alabama, and the proposed *Amici* suggest that there are provisions in Alabama's program other than Rule 400-4-5-.04(4) [now R. 400-3-8-.03(5)] which support EPA's finding that the requirements of 42 U.S.C. § 300h(b)(1)(B)(i) are satisfied. For example, they suggest that R. 400-4-5-.04(2) [now R. 400-3-8-.03(2)] satisfies the statutory requirement that persons proposing to inject fluids must satisfy the state that their proposed injection will not result in the presence of any contaminant in underground sources of drinking water which may adversely affect the health of persons. This rule however, merely says that "[c]oal beds shall not be hydraulically fractured in a manner that allows the movement of fluid containing any contaminant into a USDW, if the presence of that contaminant may . . . adversely affect the health of persons." The rule does not require that the person proposing to inject fluids must *satisfy the State* that their proposed injection will not result in the presence of any contaminant in underground sources of drinking water which may adversely affect the health of persons *prior to* obtaining approval to inject. 42 U.S.C. § 300h(b)(1)(B) was discussed in the Report of the House Interstate and Foreign Commerce Committee:

> The Administrator's guidelines for State underground injection control programs must, as a minimum, require States to . . . require applicants for underground injection permits to bear the burden of proving to the State that its

> injection will not endanger drinking water sources; . . ..

H.R. Rep. No. 93-1185, 93rd Cong., 2nd Sess. 28 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6454, 6481.

EPA, the State Oil and Gas Board of Alabama, and the proposed *Amici* also suggest that R. 400-3-8-.03(6)(a)(2) (construction standards), 400-3-8-.03(7) (record keeping requirements), 400-3-8-.03(6)(a)(5) (movement into overlying strata), 400-3-8-.03(6)(d) (progressively stricter standards), 400-3-8-.03(6) (additional information may be required) support the EPA's determination that the Alabama program satisfies the requirement of 42 U.S.C. § 300h(b)(1)(B)(i). Not only do these rules not support a finding that the Alabama program requires that the person proposing to inject fluids must *satisfy the State* that their proposed injection will not result in the presence of any contaminant in underground sources of drinking water which may adversely affect the health of persons *prior to* obtaining approval to inject, but the EPA did not rely on them to demonstrate satisfaction of the requirements of 42 U.S.C. § 300h(b)(1)(B)(i). *See* 65 Fed. Reg. at 2894 ("Section 1421(b)(1)(B)(i) is satisfied [by] Rule 400-4-5-.04(2) [now R. 400-3-8-.03(2)]"). "[A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 50 (1983) (citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962); *SEC v. Chenery*, 332 U.S. 194, 196 (1947); *American Textile Manufacturers Inst. v. Donovan*, 452 U.S. 490, 539 (1981)). "[T]he courts may not accept appellate counsel's post hoc rationalizations for agency action." *Id.* (citing *Burlington Truck Lines*, 371 U.S. at 168).

The Safe Drinking Water Act requires that State underground injection control programs, including programs developed and approved under 42 U.S.C. § 300h-4, must require that persons proposing to inject fluids must satisfy the state that their proposed injection will not result in the presence of any contaminant in underground sources of drinking water which may adversely affect the health of persons. 42 U.S.C. §§ 300h(b)(1)(B)(i), 300h(d)(2). EPA approved Alabama's underground injection control program without such a requirement. The Court of Appeals erroneously affirmed EPA's arbitrary approval. 5 U.S.C. § 706(2)(a). *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency action is arbitrary if it fails to consider the relevant factors or an important aspect of the problem); *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974) (same); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) (same). Accordingly, the Court of Appeals decision should be reversed.

STATE UNDERGROUND INJECTION CONTROL PROGRAMS APPROVED UNDER 42 U.S.C. § 300h-4 MUST STILL MEET THE REQUIREMENTS OF 42 U.S.C. § 300h(b)(1)(B).

The State Oil and Gas Board of Alabama and proposed *Amici* suggest that the increased flexibility allowed by 42 U.S.C. § 300h-4 for oil and gas related underground injection control programs authorizes states to deviate from the requirements of 42 U.S.C. § 300h(b)(1)(B) and to develop programs which contain provisions that are an effective alternative to the requirements of 42 U.S.C. § 300h(b)(1)(B). This is simply not true.

42 U.S.C. § 300h-4 provides that "in lieu of the showing required under subparagraph (A) of section 300h-1(b)(1) of this title the State may demonstrate that such portion of the State program *meets the requirements of subparagraphs (A) through (D) of section 300h(b)(1)* of this title and represents an effective program (including adequate recordkeeping and reporting) to prevent underground injection which endangers drinking water sources." (Emphasis added). Thus, the plain language of 42 U.S.C. § 300h-4 allows states flexibility to develop effective programs without having to meet all of the EPA regulations which would otherwise be applicable, 40 C.F.R. Part 145, but retains as minimum requirements subparagraphs (A) through (D) of 42 U.S.C. § 300h(b)(1), including the requirement that persons proposing to inject fluids must *satisfy the state* that their proposed injection will not result in the presence of any contaminant in underground sources of drinking water which may adversely affect the health of persons *prior to* obtaining approval to inject. 42 U.S.C. § 300h(b)(1)(B). Accordingly, despite that a state program is developed and approved under 42 U.S.C. § 300h-4, such program must still meet the requirements of 42 U.S.C. § 300h(b)(1)(B).

REMAND BY THE COURT OF APPEALS DOES NOT PRECLUDE CERTIORARI REVIEW BY THE SUPREME COURT.

28 U.S.C. § 1254 does not impose restrictions on when the Supreme Court may review a case in the Court of Appeals. *E.g., Aetna Cas. & Sur. Co. v. Flowers*, 330 U.S. 464, 466-67 (1947)(remand or issuance of mandate does not preclude review).

The Court of Appeals' remand of the EPA's determination that coalbed methane wells are "Class II-like" wells rather than "Class II" wells is likely to have no impact on the Agency's determination that the Alabama underground injection control program "meets the requirements of subparagraphs (A) through (D) of section 300h(b)(1) of this title and represents an effective program (including adequate recordkeeping and reporting) to prevent underground injection which endangers drinking water sources." 42 U.S.C. § 300h-4. The "Class II-like" and "Class II" distinction was only relevant if Alabama could not take advantage of 42 U.S.C. § 300h-4 and had to comply with all the requirements for Class II wells in 40 C.F.R. Part 145. The Court of Appeals decided adversely to Petitioner on this issue and Petitioner has not sought review of this issue here.

CONCLUSION

The Court of Civil Appeals erred in affirming EPA's approval of Alabama's revised Class II UIC program. EPA's approval is arbitrary because EPA failed to require that coalbed methane well operators satisfy the State that their proposed injection of hydraulic fracturing fluids will not result in the presence of any contaminant in underground sources of drinking water which *may adversely affect the health of persons* as required by 42 U.S.C. §§ 300h(b)(1)(B)(i) and 300h(d)(2). Accordingly, the petition for writ of certiorari should be granted.

Respectfully submitted,

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